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ABSTRACT

To convince federal policy-makers that the sexual harassment of students is both illegal and serious, the National Advisory Council on Women's Educational Programs issued and circulated a "Call for Information on the Sexual Harassment of Students," a request for descriptive anecdotes from victims and others who knew of harassment incidents. Anecdotes from 116 victims identified 5 types of sexual harassment: (1) sexist remarks or behavior; (2) inappropriate and offensive, but sanction-free sexual advances; (2) solicitation of sexual activity by promise of rewards; (4) coercion of sexual activity by threat of punishment; and (5) sexual crimes and misdemeanors. Information from students in postsecondary institutions who have been harassed by faculty, staff, or other employees reveals that few colleges and universities are dealing with the problem and that students are coping privately with harassment. The Council recommends that schools publicly state their policy on the prohibition of sexual harassment, avenues of complaint, and sanctions for incidents, and suggests that the federal government make sexual harassment an act of discrimination under Title IX. (A technical supplement contains appendices and chapters on topics of interest, including a reprint of the "Call for Information.") (NRB)

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ED197242

SEXUAL HARASSMENT

A REPORT ON THE SEXUAL HARASSMENT OF STUDENTS

by

Frank J. Till

August 1980

Report of

THE NATIONAL ADVISORY COUNCIL
ON WOMEN'S EDUCATIONAL PROGRAMS

CG 014899

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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PREFACE

The National Advisory Council on Women's Educational Programs was established by Congress in the Women's Educational Equity Act of 1974 to advise Federal officials and disseminate information concerning the achievement of equity for women and girls in education. It has seventeen public members appointed by the President and three ex officio members.

From its inception the Council has focused major attention on the enforcement and interpretation of Title IX of the Education Amendments of 1972, the primary statute which prohibits sex discrimination in Federally assisted education programs and activities.

The Civil Rights Committee of the Council is charged with implementing Council activities pertaining to sex discrimination. It carried responsibility for the project which has culminated in this report on sexual harassment of postsecondary students.

In addition to members of the Committee, others who contributed time and valuable suggestions to the development of the report are Arlene Kaplan Daniels, Grace Mastalli, Judy Oshinsky, and Valerie Wolk. Special appreciation is due Kathleen Dauito for her work on graphics and typing of the manuscript.

PART I:

THE REPORT

INTRODUCTION

Sexual harassment on the job has surfaced as a sex discrimination issue only recently, although it is a problem women in the workforce have always faced. National consciousness about the issue has been focused by the publication in rapid succession of several major books, monographs, and magazine articles, and the production of a very successful network television story shown in prime viewing time. The U.S. Equal Employment Opportunity Commission has contributed to this burgeoning awareness by publication of official guidelines to let both employers and employees know that sexual harassment on the job is illegal under a Federal law prohibiting sex discrimination in employment.

This growing interest led the National Advisory Council on Women's Educational Programs to commission a legal review to determine whether another Federal law -- Title IX of the 1972 Education Amendments -- could be invoked to prohibit the sexual harassment of students. That study, published in 1978, concluded that sexual harassment of students was prohibited by Title IX, violations of which can mean the loss of Federal financial assistance.

Joined by several private sector advocacy groups, the Council then began to urge the primary Federal enforcement agency for Title IX to publish a major policy interpretation on sexual harassment and to begin a concerted enforcement campaign focusing on the issue. That agency, the Office for Civil Rights in the Department of Health, Education, and Welfare (now in the Education Department), did not respond to the recommendation.

During academic year 1979/80, the Council issued and gave wide circulation to a "Call for Information on the Sexual Harassment of Students," a request for descriptive anecdotes from victims and others who knew of incidents. The Council hoped to be able to use the responses to the Call to raise the sensitivity of Federal policy makers to the need for a vigorous Title IX campaign on behalf of students.

Once the responses began coming in, however, the Council realized that the material was significant enough to support a product of greater dimensions than orginally envisioned. This report is that product.

The report is not a "definitive" work. There is still no comprehensive report or book on the sexual harassment of students; it is instead a pilot study, designed to spark the kind of discussion which leads both to direct action and further study. We trust it will also serve the Council's original purpose: to convince policy makers that the sexual harassment of students is not only illegal but a problem serious enough to compel Federal involvement.

FINDINGS AND RECOMMENDATIONS

1. **Finding:** The sexual harassment of postsecondary students is an increasingly visible problem of great, but as yet unascertained, dimensions. Once regarded as an isolated, purely personal problem, it has gained civil rights credibility as its scale and consequences have become known, and is correctly viewed as a form of illegal sex based discrimination.

   Recommendation: That the Office for Civil Rights in the U.S. Department of Education immediately promulgate and disseminate widely a policy to explicitly establish sexual harassment as a sex based discrimination in violation of Title IX (1972 Education Amendments), and that other Federal agencies with Title IX enforcement responsibilities adopt those guidelines.

   Recommendation: That the President issue an Executive Order directing all Federal agencies administering laws or provisions which prohibit sex based discrimination to promulgate explicit prohibitions of sexual harassment under those jurisdictions.

2. **Finding:** While Federal commitment to Title IX enforcement in this area is important, the problem cannot be overcome by enforcement action alone.

   Recommendation: That Federal enforcement agencies develop and make available to colleges, universities, advocates, and others technical assistance packages designed to increase awareness and reduce tolerance for sexual harassment on the campuses.

   Recommendation: That Federal grants programs with equal educational opportunity priorities (especially the Women's Educational Equity Act Program, the Fund for the Improvement of Postsecondary Education, and the National Institute of Education) encourage and support research to further understand and combat sexual harassment, and that the results of that research be disseminated widely.

Are you telling me that this kind of horsing around may constitute an actionable offense?

-- Character in recent television special on sexual harassment.

WHAT IS SEXUAL HARASSMENT ?

While it's more than a wink yet not a seduction, considerable difference of opinion exists in the literature about both the essential nature and delineations of sexual harassment:

> ...(S)exual harassment in the classroom... (is) harassment in which the faculty member covertly or overtly uses the power inherent in the status of a professor to threaten, coerce or intimidate a student to accept sexual advances or risk reprisal in terms of a grade, a recommendation, or even a job.
>
> Clark, 1979

> ...(S)exual harassment is broader than sexual coercion... (and) can only be understood as the confluence of authority relations and sexual interest in a society stratified by gender.
>
> Benson, 1979

> Sexual harassment is not a sexual issue, it is an issue of power.
>
> Oshinsky, 1979

Sexual harassment... refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another... When one is sexual, the other material, the cumulative sanction is particularly potent.

MacKinnon, 1979

Sexual harassment is... unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker.

Farley, 1979

Sexual harassment... imposes a requirement of sexual cooperation as a condition of... advancement.

Bloustein, 1979

It can be any of all of the following: staring at, commenting upon, or touching a woman's body; requests for acquiescence in sexual behavior; repeated nonreciprocated propositions for dates, demands for sexual intercourse; and rape... Sexual harassment is... an act of agression at any stage of its expression, and in all its forms it contributes to the ultimate goal of keeping women subordinate at work.

Farley, 1979

Sexual harassment may occur as a single encounter or as a series of incidents... It may place a sexual condition upon employment opportunities at a clearly defined threshold... or it may occur as a pervasive or continuing condition of the work environment. Extending along a continuum of severity... examples include "verbal suggestions or jokes, constant leering or ogling, brushing against your body 'accidentally,' a friendly pat, squeeze or pinch or arm against you, catching you alone for a quick kiss, the indecent proposition backed by the threat of losing your job, and forced sexual relations." Complex forms include the persistent innuendo and the continuing threat which is never consummated either sexually or economically. The most straightforward example is 'put out or get out.'

MacKinnon, 1979

Any unwanted sexual leers, suggestions, comments or physical contact which you find objectionable.

Working Women United Institute, 1978

Whereas in rape cases, the man overpowers a woman with a weapon or threat of loss of life, in sexual harassment he overtly or implicitly threatens her with loss of livelihood, or with academic failure and hence loss of future livelihood.

Project on the Status and Education of Women, Association of American Colleges, 1978

Definitions of sexual harassment vary depending on the sex, employment or ideology of the definer. Most feminists are willing to accept a broad definition which places degrees of harassment along a continuum ranging from sexist remarks to rape.

Truax, 1979

Rather than choose among the myriad, sometimes conflicting definitions of sexual harassment currently in use, the Council opted to structure its Call for Information without a definition in the hope of developing a victim based definition from the responses. This approach permitted the problem to define itself and avoided limiting responses to fit any particular bias or ideology. The Council viewed this as particularly important in light of its attempt to analyze sexual harassment in a frontier area; most of the work done to date has dealt with employment situations which differ in many respects from the situations faced by students. The results of this approach were several:

- Respondents described a wider range of incidents as "sexual harassment" than most existing definitions permit; the spectrum included rapes as well as non-salacious slurs about the gender of the respondents;

- Much of the activity reported appears malevolent in effect but not necessarily in intent; in many cases, the perpetrator does not appear to understand his behavior as "harassment" of any kind;

- Respondents often distinguished between offers to reward sexual cooperativeness and promises to punish sexual non-cooperativeness -- the two did not always or escalate from requests to demands;

- Sexual overtures void of any promise or threat were described by a number of respondents as sexual harassment, especially when repeated; and

- Individual students reflected great variety in describing what constituted "unacceptable" behavior and in providing definitions for sexual harassment.

These general factors led the Council to a working definition:

> Academic sexual harassment is the use of authority to emphasize the sexuality or sexual identity of a student in a manner which prevents or impairs that student's full enjoyment of educational benefits, climate, or opportunities.

Essentially, five types of activity were described as sexual harassment:

1). Generalized sexist remarks or behavior;[1/]

1/ Several persons who commented on this report in pre-publication review indicated a belief that these complaints were not actually "sexual harassment" to the extent that they do not involve sexuality, per se, but sex bias and/or stereotyping. These commenters felt that "sexual harassment" should be limited to use as a descriptive phrase for acts involving either attempted or realized sexual encounters. Others disagreed, and felt that there is an inherent sexual content "in or underlying generalized sexist remarks or behavior, which often establishes a tone or context which in its awkwardness is more damaging than many overt acts." (Mastalli, G.)

2) Inappropriate and offensive, but essentially sanction-free sexual advances;

3) Solicitation of sexual activity or other sex-linked behavior by promise of rewards;

4) Coercion of sexual activity by threat of punishment; and

5) Sexual assaults.

These types, or categories, are not sharply delineated, although they are arranged in a roughly hierarchical continuum. Many of the reported incidents involve several categories, as when a student is promised something in exchange for sexual favors and simultaneously threatened about noncooperation. Thus, the hierarchy of the categories is only approximate, since factors unique to any particular case may magnify its relative weight. For example, punishment-free sexual advances accompanied by touching might be viewed by some as considerably more threatening or injurious than an offhand offer to better a grade in return for a sexual encounter.

It is the common threads among the categories that provide the basis for a victim-generated definition of sexual harassment -- irrespective of the sex of the offender -- in the education context. These common elements are:

- Distortion of a formal, sex neutral relationship (e.g., teacher/student, counselor/client) by an unwelcome, nonreciprocal emphasis on the sexuality or sexual identity of the student; and

- Infliction of harm on the student.

Category 1: Generalized sexist remarks or behavior:

This type of incident is the closest in appearance to racial harassment; the sentiments or actions involved are often fiercely anti-female (or anti-male), and they are not designed to lead to sexual activity. Rather, the sentiments or actions are directed at the victim because of her (or his) gender. Moreover, they often affect whole classrooms; the offense may be "generalized" both by its nature and its audience.

> Sexual harassment was a way of life. Field trips -- a tradition for geographers-- were abandoned because women were considered contaminants. One memorable instructor (whose course was required of all graduate students) regularly informed each new generation of graduate students that women were not good for much of anything but sexual exercises. He enjoyed going into graphic description of the trials and tribulations of a journey taken with a group of students during which one female experienced the onset of menstruation. "Blood all over the damn place," our professor told the class, "had to hike miles out of the canyon to find wadding to stuff in her crotch." 2/
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> * * * * * *
>
> Later on, Dr. _____ took me aside and explained to me how women rarely make good field geologists. This, he maintained, was due to their difficulty in perceiving things in three dimensions. He contended that when figuring out GRE, SAT, ACT (etc.) scores, the "educators" take this inherent deficiency into account.
>
> * * * * * *

As both of these anecdotes suggest, many of the complaints about this form of sexual harassment came from women breaking into traditionally male dominated disciplines. The effect of this type of harassment varies by victim, of course, but it can be extreme.

These anecdotes also point out the seriousness of harassment by gate keepers -- those who teach required courses or who have the authority to make critical decisions about a student's advancement. The extraordinary importance of such positions lends an exceptional degree of significance to every interaction with students, and makes sexual harassment of all types particularly harmful.

2/ Unattributed anecdotes are drawn from responses to the Council's Call for Information, and have been edited to protect the respondents.

The leer, off-color joke, suggestive story, crudely sexual remark, ogling, and similar behaviors also are grouped in this category. Respondents tended to view these particular forms of harassment in two ways: as dehumanizing (see the first three anecdotes below) or as veiled threats, hints that only circumstance stood between them and a more serious form of abuse (see anecdote four below).

> Last year I went to see a professor about signing up for an independent study project. When he invited me into his office, and in the presence of another professor, he greeted me at the door saying something to the effect of "Well, well, what can I do for you?" After I told him that I wanted to take an independent study, and after he told me that I could not have it, he tried to get me to sign up for a class that he was teaching. Throughout this time, he was looking me up and down while making stops between runs. His colleague was so embarrassed that he kept his eyes on the floor.

* * * * * *

> One professor in my major was constantly making comments about "how cute I was" or "how serious" or "how motivated I seemed to be" after class or while I was studing in the library. Needless to say, I felt very uncomfortable and started wearing old jeans to his classes.

* * * * * *

> One physics professor gave his students a lecture on the effects of outer space on humans. His example consisted of crude drawings of a shapely woman supine in a vessel; the effects of vacuum were demonstrated by changes in the size of her "boobs." This man -- a "mature" adult -- told the story with all of the sniggering, head-hanging, and red-facedness I might have expected from an adolescent.

* * * * * *

This semester one of my graduate course professors... started the first class session asking the women in the class if they liked recreational sex. The second session went the same way. The third session, after he found out which women were married, he asked me why I wasn't married. During the fourth session, he asked me what I thought love was. I told him love to me was when a child has a fluffy rabbit that the little boy or girl loves dearly and takes care of. I was trying not to apply the term to myself in a sexual manner, even though I felt that is what he wanted me to say. Then he said, "Well, what would you do if I said that I loved you?" I said that I would say no, but because it was my choice to remain independent, and not because I dislike him as a person. He then said, "Well, what would you say if I said that I wanted to make love to you?" Again, I said no. Then, after he made reference to how a larger man could just overpower a smaller woman, he gave an example of how he could just go ahead and rape me. When I asked him what he would do when he was brought in to be tried, he said that he would just lie. When he adjourned the class that night he told everybody that they could all go except [me]. I did stay after and asked him what he wanted. He just started complimenting me on what a fine lawyer that he thought that I will be. As we left the classroom, he started toward his office while trying to continue his coversation with me. I then turned the other direction and said goodbye.

* * * * * *

Confronted with these examples, few not already sensitive to the problems of sexual harassment see them as more than mild aggravations. For the women involved, however, considerably more is often at stake. Returning to the student in the first anecdote of this sub-group:

> The next spring when I went to apply for a job with the city, he was the person conducting the interviews. Even though the pay was excellent, I did not accept the job offer because of the way he had treated me that day last fall.

One consequence of harassment, then, may be the "chilling effect" it produces, limiting the employment or educational experiences of victims.

Category 2: Inappropriate and offensive, but essentially sanction-free sexual advances

This category of complaints is distinguished from the preceding by the introduction of requests for social or sexual encounters, often accompanied by touching. In itself, physical contact can be a form of sexual harassment when it is of a lewd type, as discussed below under category five.

A number of respondents described unwelcome but sanction free sexual advances from faculty and other institutional agents as simultaneously flattering and discomfiting, while several expressed the belief that such behavior did not really constitute harassment unless it was continuous or accompanied by excessive physical contact.

Most researchers who have discussed incidents of this type have pointed out the fact that the possibility of sanctions for noncooperation is implicit in all sexual advances across authority lines, as between teacher and student. Despite the obvious truth of this, many respondents to the Call for Information discussed the discomfort of being approached, and distinguished that from feeling threatened.

Two homosexual incidents (male) were reported in this category. The majority of complaints involving counselors also fell within this group.

> We were in his office, discussing my work in his practicum, when he propositioned me. He asked me to "fool around" with him in the office, "but quietly, so no one hears." When I said "No" he came toward me and put his arms around me. I got up and started

for the door. He came after me, held my arms, and backed me up against one of the bookshelves lining his wall. He pressed himself against me and tried to kiss me. For what seemed like a long time, I passively resisted and he increased his pressure against me. He was decidedly stronger than I. He finally gave up when someone knocked at his door. He made some psuedo-psychological remark about my "running" from him. I slipped out as he opened the door for the person who knocked.

* * * * * *

After the quarter was over, he invited me by phone to meet him at a coffee shop, presumably to discuss [my] paper. Perhaps I was being overly naive, but I was surprised when he did not even bring the paper with him. He proceeded to make various crudely obvious sexual propositions: inviting me to "experiment sexually" with him and to go over that night to his home for dinner... trying to put an arm around me, touch, etc.

* * * * * *

I longed for the courage to confront him about his harassment, wishing I had the nerve to ask him if he'd touch me and comment on my appearance if I were a male graduate student.

* * * * * *

Under the auspices of marital counseling and interest in helping students with emotional problems, this instructor persuaded the student to confide in him and to develop an intimate relationship which he then broke off after his sexual satisfaction.

* * * * * *

[The incident took place during a graduate practicum in psychology.] At first it was all very subtle -- hugs after our joint sessions. Then, when we would discuss the client, he would put his arm around me or hold my hand. At one point, during a session with a client, he reached over and held my hand... After the session he began to hug me very sensually, mentioning that he'd heard I'd just broken up with my boyfriend. I could no longer "cooperate" -- it was quite clear to me what he wanted was sex... I told him I was uncomfortable with so much touching -- I was needing my own "space." He got angry and told me I couldn't be much of a counselor if I couldn't share touching with others.

* * * * * *

A male undergraduate student reported that a friend of his had left the University, because he had received a sexual proposition from one of his instructors. The student reporting the incident was extremely angry that such a thing should occur, and that his friend feared to report it.

* * * * * *

The student-counselor situation... concerned attempts to seduce returning women students who were pursuing undergraduate degrees after a hiatus to begin their families. Because of their special status and special problems as returning women students, they were referred to the counselling center for the purpose of receiving academic counselling. These women met separately with the counselor in his private office. The counselor began his interviews by asking these women what special difficulties they were having in their course work. When they recounted their concerns, he told them that their problems were sexual in nature, and often offered to help resolve them.

* * * * * *

The misplaced hug, the misguided attempt to draw a student into a sexual relationship, the direct proposition -- for the most part, these incidents might be seen as only marginally outside the bounds of conventional behavior, even though some courts have found such activities to be grounds for civil suits. What makes them more -- and often considerably more -- important, is the context, the roles of the principals. The discomfort such advances engender in the victims may seriously impair their ability to participate fully in the classes of the faculty member involved, or to obtain the same counseling services available to other students.

Often, serious avoidance behavior by students may be the outcome regardless of the manner in which the perpetrator handles his failure -- or success -- at sexual conquest.

> I... became quite skilled at glancing down department hallways to make sure he wasn't there before venturing forth, and pretending not to see him when we did cross paths. The whole experience has left me quite mistrustful of faculty in general and I still feel some trepidation when visiting the department.

* * * * * *

> The impact of this isolated incident on me has been enormous. It has changed my way of relating to the program. I used to think it could be a place of learning, mentoring, work and fun. Now, although there are still people there whom I trust and learn from, I am angry and insecure every time I'm in that building. I have heard that this professor has propositioned at least two other students, and I am silently furious. I've said nothing about this except to my husband...

* * * * * *

Category 3: Solicitation of sexual activity or other sex-related behavior by promise of rewards.

That is, promises often turn into threats when met with noncooperation. In some cases, however, the promise of a reward for cooperation does stand alone, without threats of punishment for noncooperation.

The real crux of the category is the attempt to use institutional authority to make payment for a sexual favor, or to induce conformance with sex-role stereotypes. This category in its extreme literally amounts to an attempt to purchase sexual behavior. In its more blatant forms, it could be prosecuted as a criminal act. Where grades are the currency of barter, the attempt to engage a student in an act of what may be viewed as prostitution is perhaps less raw than an approach on the street involving money, but it is often all the more harmful for its setting, and may still constitute a crime.

Even "banter" along this vein may cause harm. Students may be mystified and confused by the interaction due to the power and prestige of the initiator. This is especially the case where the student propositioned is young or naive, and may therefore fail to fully grasp the significance of the request. In the following examples, however, the students do see the meaning of the proposition very clearly.

> ... I was called to the office of a professor who was teaching my course [to discuss] a grade I received on a paper... (W)e began to talk and discuss different perspectives about my paper. This led to discussion about our personal lives. He then proceeded to say that there was "another way" to receive an A for the course. His proposal was to "spend time" together outside of classroom work. He made the statement that spending lots of "time" together would give him the opportunity to get to know me better. Needless to say I was frightened but also knew exactly what he was meaning. [For] several weeks after this he called me continuously at my home...
>
> * * * * * *
>
> ... I went to his office to find out why there were two grades on my midterm instead of just one... In response to my question about the

two grades, he asked, "What grade do you want? Do you want the higher grade?"... He was trying to use the grade to barter for my "affections."

* * * * * *

I had done an independent study class technically with Dr. _____ though I had minimal interaction with him. He gave me an "A" in that class, mostly, I believe, because of my appearance. I deserved that grade, but he had no conception of the actual work I had done... [In a later class with this man] another student went along with Dr. _____'s games; she brought him lunch every day, wore earrings and dresses into the field, and sat (closely) next to him in his truck each trip. She received an "A" in the course.

* * * * * *

What distinguishes this category from the previous one is the reward for complicity -- and what distinguishes it from the following one is the absence of any directly stated or implied threat for cooperation. To many researchers, the three categories may represent a distinction without a difference, since the lines are drawn on the basis of subjective readings by victims and often involve only subtle shadings of tone or circumstance. The respondents to the Call for Information, however, often made the distinctions with a high degree of sophistication while expressing different kinds of reactions to each of the types of incident.

Category 4: Coercion of sexual activity by threat of punishments

In the business world this form of harassment is labelled "put out or get out," and is generally thought of as the essence of sexual harassment. For students, it may be termed, in the words of one writer, getting an "A for a lay," but the experience is no less raw, often more unexpected, and can have consequences that last for a lifetime. What is at stake is often more than one grade or a single recommendation. Too frequently it is access to a discipline and so a career that is jeopardized.

This category, then, is at the core of what academic and employment "sexual harassment" entail: exploitation of a difference in authority to compel a choice between extremely unwelcome alternatives.

And always, it is the perceptions of the student which are critical, not the motives or intentions of the authority figure. There is often too much at stake to treat this approach lightly even when that may be the wish of the harasser; a student might not be expected to distinguish between a "joke" and a threat when authority disparities are involved.

> I see male colleagues and professors chumming it up and hear all the talk about making the old boy network operate for women, so I thought nothing of accepting an invitation from a... professor to attend a gathering at his house. Other graduate students were present. Should I have stayed home? Was I asking for whatever I got? I say no. Anyway, the professor made a fool out of himself pursuing me (it took me a while to catch on) and then blurted, "You know I want to sleep with you. You know I can do a lot for you; I have a great deal of influence. Now, of course I don't want to force you into anything, but I'm sure you're going to be sensible about this." I fled.
>
> * * * * * *
>
> This same faculty member had yet another known and not even subtle affair with a fourth woman -- who terminated it and then failed comprehensive examinations shortly thereafter... Clinical faculty "grade" comprehensives without student identification on them; when this woman took hers over, two other women were taking theirs for the first time. Two failures resulted, and one woman was told that it was because of an error in identity -- that the woman who terminated the affair was meant to be failed twice. (She would then have been out of school.)
>
> * * * * * *

A former English student of mine, a mother of four who successfully completed my class, reported to me that her English instructor for the _____ semester asked her in explicit terms for sexual favors and in return she would receive a decent grade. She did not comply and was most upset. She completed all work, and her grades were C or higher. She received an F on her final exam (which occurred after his request) with no comments and a D for her final grade.

* * * * * *

[Following an extremely traumatic incident of sexual harassment at one school] I continued on to a state university where I [was again victimized] by a professor of long standing. This occurred during my senior year [in] a one-on-one graduate studies course. This man asked me for dates repeatedly until I accepted one including his... [children] and my son. I rebuffed his attempted kiss and future requests for dates as gracefully as I could, but it was obvious he was angry... I had an "A" going into the final exam. One day before the exam he assigned me to read another book for the exam. I felt this was unreasonable, but attempted to purchase the book in order to skim it. I discovered that the book was out of print and entirely unavailable. I returned to his office to ask for help but he offered no solution, only renewed his efforts to take me out. I avoided the request, saying I had to study. I studied well and received a perfect score on the first three pages. The fourth page consisted of three essay and more short answer questions on the book he had assigned the day before. He called me at home that evening to tell me that I had failed the exam since the last portion was heavily weighted. I flirted and agreed to go out with him, at which point he announced that he knew I was a capable student who well deserved the "B" he would turn in as my grade.

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One researcher has written of this type of sexual harassment that:

> ...(F)eminists argue that in any classroom situation where a man grades a woman, a sexual advance of any sort constitutes harassment. Lorna Sarrel, coordinator of the Yale Human Sexuality Program, perfers to think of what takes place as "psychological coercion" rather than outright harassment, although she points out that students tend to overestimate both the vindictiveness and authority of their would-be seducers. Now that women are beginning to frame specific career goals, grades become increasingly important and "psychological coercion" increasingly troublesome... So far [Abbe] Smith [a sponsor of the Price suit on sexual harassment] has found that a teacher is rarely explicit about reprisals if a woman turns down his offer. "Instead of threatening, he asks," she says. "Then the student wonders if her response to his question will affect her grade... She's worrying about things that have nothing to do with competence to write that paper."
>
> Munich, 1978

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Several incidents reported to the Council add currency to the idea that the context and tone of an interaction can produce an extraordinarily effective form of threat, whether the faculy member involved intends it or not.

> Mr. _____ and I walked out of the classroom, then he asked me if I had any suggestions to help my grade (a D where a C had been earned). I told him I didn't know what my options were. He said he didn't give any suggestions only took them. I asked him if I could write a report for extra credit. He answered with, "I can't give that option to you unless I give it to everyone." I didn't have any other suggestions so I excused myself saying I had to go to class. He stopped me and said, "Some people have suggested they take incompletes and take my class in the fall." I asked him if I could do that and Mr. _____ again stated, "I can't give that option

to you unless I give it to everyone." I was confused, wondering why he even mentioned it and said good-bye again. Mr. _____ interrupted me again and said, "I've given you three options and you've discounted two of them" At this time, myself really confused and trying to think of what option he had given me, he asked me to step into the classroom. When we went into the classroom Mr. _____ walked to the door and looked down the halls, by this time I was becoming nervous. Mr. _____ then walked up to me and said, "There's one option I can give to you that I can't give to the males in the class. Sexual favors?" I was shocked and said, "I can't answer that." He asked, "What do you mean you can't answer that, yes or no?"...

•

I was glad I did not have any other finals to take as I probably would not have done well on them... This incident has unfortuantely left me feeling disillusioned and wary of male professors. I know it isn't right to generalize like that, but I can't help the uneasy feeling.

* * * * * *

I was at that time a professional librarian, going to a [large, urban college] at night to earn a second Master's degree; I was 22 years old. One afternoon, toward the end of the semester, one of my professors came into the branch library where I was working and asked me to take a walk with him. I agreed (it was warm and close to my break time) and he asked me to sit in his car with him, and like a fool, I did. When we were seated in the car, he tapped his shirt pocket and told me that he had in it the postcard on which my grade was written, and he asked me to give him a kiss. I declined, and I think he asked me if I wouldn't reconsider, and I said "no" and he gave me the postcard (with an A written on it.) Now... I was in no way threatened by this incident, and I never felt in any danger. I was, however, placed in a damn awkward situation, and if he made a practice of this, I imagine he might have intimidated quite a few women into kissing him. The connection, although it was ambiguous, with my grade in his pocket, signifies the attempt at intimidation.

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Category 5: Sexual crimes and misdemeanors

This category applies to acts which, if reported to police authorities, would be considered crimes or misdemeanors. For the most part, they go unreported, even when they are extreme -- such as forced sexual intercourse -- because of the student-victim's fear of the consequences of reporting the incidents to <u>any</u> authority. That fear often introduces a form of consent into the acts, to the extent that the students do not resist strenuously and often continue their association with the perpetrator despite stress, anxiety or fear. This frequently robs the acts, especially those involving force, of their criminality. Consent is an absolute defense against charges of rape, for example, and cooperation of any type (including passive resistance) is likely to be construed as "consent" in the absence of physical danger. Although the perpetrator involved may have the power to destroy the student's academic career -- and thus dramatically change the course of the student's life -- such acts are not likely to be viewed as presenting "physical" danger, but only "psychological coercion," which is generally considered an insufficient form of force to establish rape.

The acts may still be illegal under civil law, however, and the anecdotes below are also probable violations of Federal nondiscrimination law. What distinguishes these acts from the touching behavior that accompanies other forms of sexual harassment is their exaggeratedly sexual nature involving explicitly prohibited activities such as a coerced contact with genitalia.

> The incident occurred at a departmental party at [a large public university], between a male faculty member and a female student. The student had gone upstairs to the bathroom, saw the man in a room, walked in to make a friendly remark. He explored her, and guided her hands to his genitalia... Luckily, another student interrupted the scene. No action has been taken. The young woman has first to recover a sense of security, and then something may be done.

* * * * * *

This professor was... involved in an organization... in which I was quite active. When posing for the activities picture I found myself placed beside this professor, and surrounded by other club members in the back row. While the photographer was snapping his shots, I felt this hand on the small of my back which descended slowly rubbing and squeezing the whole time. Though the ordeal lasted only about 20 seconds, I felt extremely mortified and humiliated.

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At this time, no one is aware of the incident except the victim, the instructor, and myself. A young female student had to leave for home (for family reasons). Because she (subsequently) missed a vital and final exam... she arranged to take a make-up exam. (T)he male instructor began to sexually fondle her. She left the office in shock and has been too frightened to return in order to make up the test.

* * * * * *

All the incidents... share a pattern: indecent exposure. Although the precise circumstances vary, this faculty member (young, supposedly socially conscious) would initiate the incidents by tucking his shirt in," fixing his belt," or otherwise rearranging his clothing. He is also known to verbally sexually abuse students by initiating discussion on penis size, how he has overcome his inferiority complex about his small penis size and following this with a verbal offer to expose his penis to view. This faculty member has also exposed himself in his home to at least one other graduate student in another department.

* * * * * *

While an undergraduate at a local community college, I was pressured by an instructor (head of the department in which I was majoring) to continue discussions and work during coffee and lunch appointments. On the first such occasion, I rejected his attempt to kiss me, but relations remained pleasant. On subsequent occassions, during which he helped me with the research for a paper, he behaved with propriety. Finally, after repeated requests, I agreed to meet with him for a drink at a nearby restaurant. At the last moment, he phoned to say his car had broken down; could I stop by and pick him up. When I turned up he invited me in to hear a tape on a subject we had been discussing. After 45 minutes and a drink, I went to the door to leave. He grabbed me and we wrestled for quite a time until I submitted to intercourse with him. I received an "A" from him every quarter for the remainder of the year, even though I had virtually stopped attending his class. A few months after I left this institution, I received a call from a girl I scarcely knew. She said that she had seen me with this instructor, and noticed his attentiveness and my later absence from the class. She went on to say that he had attacked her and that she feared she was pregnant. She wanted to know if I had had similar problems with him, and asked for advice. She was nineteen. We discussed the matter but decided not to report him if she wasn't pregnant. Fortunately she was not pregnant and we dropped the matter... I am now sorry that I did not have the courage and sense of self I needed when [this incident and one other recounted in her response] occurred.

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COPING WITH SEXUAL HARASSMENT

The responses to the Council's Call for Information support the conclusions drawn by most researchers that victims tend to try to manage incidents of sexual harassment -- no matter how severe -- on their own. The most common tactics are avoidance, "dressing down," submission, and ignoring the incidents in a usually futile hope that they will not be repeated. Immediate, clearly articulated rejection (or objection) appears to be the most effective "coping" response, but this is not always perceived as realistically available because of the relative authority position of many principals -- e.g., where the faculty member is head of the victim's major department. Given the option, most victims couch their rejection of overtures as kindly as possible, citing other relationships, a general reluctance to become involved with faculty/counselors/employers, and lack of time for social encounters. Too often, these excuses are disregarded or misread as encouragement -- i.e., the idea is all right but the circumstance/ timing is wrong.

> I had a class with _____ when I started my doctoral program. He left notes on my papers asking me to come in and see him. I was really impressed -- he seemed to take such genuine interest in my program. I asked him to be my chairman. He changed. He began to touch me; my arms and legs, giving me neck rubs, kissing me. I would try and pull away, he'd pull closer. He kept asking to come to my house. He came and brought wine. He began touching me again only going farther. I told him I didn't think a sexual relationship for us was a good idea because he was my chairperson, married, etc. He assured me it was a good idea. I got him to leave without having sex but his pursuits became heavier. He frequently said he wanted to be sure I knew that I didn't have to make love to him to get through the program. (Ha!) Finally, when I

couldn't take it any longer I tried to politely but firmly tell him no. Once again I was chastized for my "coldness." About three weeks later, out of the blue, he threatened to give me an incomplete in a class. He began to be bitter and sarcastic with me. I confronted him with what I thought was unfair behavior. He told me he was angry because I hadn't been "straight" with him -- he said he knew now I didn't want him so why hadn't I told him. It was obvious the man was out of touch. I tried to placate him but keep distance. I have not finished my program so I still have to deal with him. I have married... which I have really played up to keep him at a distance. He remains periodically unfair to me, was a complete jerk during my comprehensives, and generally makes life difficult. I stay away from him as much as possible... (He is sexually involved with other students)... I do not believe other profs in the department would do anything against him -- in fact I think they all know what's going on... To get rid of him as a chairperson would cause me considerable stress and reprogramming. I feel harassed and foolish for having believed his interest was in my program.

* * * * * *

Moreover, most victims appear to suffer their victimization in near isolation. Many of the respondents to the Council's Call for Information discussed their surprise at discovering they were not alone once they went public.

All together, thirteen of us had had bad experiences with this man...

* * * * * *

When it finally came into the open, I was amazed... The room was full of women who had been victimized, and almost none of us had ever told anyone but a few close friends.

* * * * * *

Why do victims keep silent or try to cope without invoking the authority of the school administration or the courts? Our responses and the work of almost all researchers indicate that there are several primary causes: fear that they -- as victims -- are somehow responsible for the incident, fear that they will not be believed, shame at being involved in any form of sexual incident, fear that by protesting they will call attention to their sex rather than to their work, a belief that no action will be taken, and fear of reprisals by the initiator and his colleagues.

I was ashamed, thought it was my fault, and was worried that the school would take action against me (for "unearned" grades) if they found out about it.

* * * * * *

This happened seventeen years ago, and you are the first person I've been able to discuss it with in all that time. He's still at _____, and probably still doing it.

* * * * * *

I'm afraid to tell anyone here about it, and I'm just hoping to get through the year so I can leave.

* * * * * *

Who was going to believe me? I was an undergraduate student and he was a famous professor. It was an unreal situation.

* * * * * *

It may... be unnecessary to bring to your attention a fact which you probably suspect to be the case on my campus: those persons with the authority to take responsible action are themselves men.

* * * * * *

For the most part, apprehensions appear justified by several letters which described attempts to involve institutional authorities.

> We were informed that there was nothing the school could do. Both the counsellor and the student acted as consenting adults off the campus grounds.
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> * * * * * *
>
> The dean told me that she would check into it, but it's been months and I haven't heard anything. Meanwhile, he goes on just like before.
>
> * * * * * *
>
> These women corresponded with the college administration to report _____'s harassment, as did faculty members who were apprised of the situation by the students. No action was taken on these complaints... (After considerable and continuous efforts to have something done, a new supervisor was appointed to head the perpetrator's department.) I introduced the matter... [to him]. His response was that he was aware of the situation but wanted to take no action, preferring to keep an "open mind." ... Now, two years later, _____ has been transferred to another administrative post in which he continues to have some, although less, opportunity for direct contact with students.
>
> * * * * * *
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> The student subsequently reported the incident to Academic Affairs, to the Dean of her college, and to the Department Chairman. No further action was taken on this case.
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> * * * * * *
>
> After an incident of overt solicition I went to the Graduate Studies Advisor. "He [the professor] would never help me anyway," I remarked as I dropped the course, a seminar

I'd anticipated eagerly. "He'd do what the head of the Spanish Department did last year — [expletive omitted] the student and then throw her out when he tired of her." My advisor disagreed, pointing out other students who'd managed to squeak through despite the enormous emotional strain they suffered. The English Department was better, he said. He expressed anger that it occurred to me. I should have known then that a few months later he'd make his own moves. So I've given up on authorities.

* * * * * *

A student came to me with a detailed account of what I would have considered outright sexual assault. I explained to her that I could take the matter to higher authority. After hearing (and taperecording) her remarks, I brought the issue to the Dean's office... where I was told that the student would have to go to the Security Office to lodge a complaint. She repeated her story to the Director. In the meanwhile, the Dean and I paid a visit to the offending professor, who assured us that his "gestures" had been misinterpreted. (Not the first time, I might add.)

Subsequently, having marshalled what I presumed were sufficient institutional forces, I was told that the only way the student could seek any redress whatsoever was through civil authorities, and that the student in question might just as well have gone to the police in the first place.

The upshot of this is that the student who is thus abused by a faculty member is not likely to get much accomplished by going to institutional authorities, because they will concoct a large and murky cloud of regulations, legalities, "assertiveness training," etc. From what I have seen, I would say that the student victim should

> bypass the institutional machine altogether and go directly to the police. I might add that, despite... comments about legal eggshells, the professor in question was fired on the instant when a similar report was filed before another dean at another university -- this time in the "sophisticated" East. The student in question left the school never to return.

* * * * * *

Some schools have begun to take the problem seriously, and a few responses to the Call for Information did cite successful actions taken on behalf of victims. These responses are discussed later in the report, but students do have options (of which they may be unaware) even when the schools reject or ignore their complaints.

IS IT ILLEGAL?

YES.

Victims of sexual harassment have a wide range of options under a variety of laws.[3/] Under certain conditions, State or Federal nondiscrimination laws may be invoked; under others, victims may file criminal charges, or bring civil suits against the school and the harassing party.

Nondiscrimination Law

Although the notion of sexual harassment as a form of sex-based discrimination is largely untested where students are the victims, a rapidly developing body of equal employment opportunity law has produced a set of basic principles which transfer very well. The primary Federal nondiscrimination laws involved here are Title VII (1964 Civil Rights Act), which prohibits sex-based discrimination in employment, and Title IX (1972 Education Amendments), which prohibits -- with a few exceptions -- sex-based discrimination against students.

Although some departures from the Title VII standards may occur once the courts begin handling Title IX cases, some key points seem likely to survive the transition. Basically, the Title VII case law implies that a violation of Title IX could be established if:

- The initiator was an employee or agent of the institution;
- The initiator was in a position to condition the academic position, success, or climate of the victim;
- The sexual harassment involved a victim or victims of only one sex; and

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3/ The scope of this paper permits only a limited review of these options. However, some additional details about violations of Federal laws and actions under tort law may be found in the technical supplement to this report.

- The institution did not provide prompt remedial and/or corrective action once it had actual or constructive knowledge (i.e., that it knew or should have known) that an act or acts of sexual harassment had taken place.

It also appears that the sexual harassment of a student by other students 4/ may trigger institutional liability if:

- The act or acts interfere with the learning environment;
- They are directed at students of only one sex; and
- The institution takes no remedial or corrective action despite having actual or constructive knowledge of the sexual harassment.

Of special importance is the fact that, unlike Title VII, Title IX requires institutions to maintain grievance procedures capable of prompt and equitable resolution of sexual harassment complaints. The lack of a grievance procedure capable of delivering speedy and just resolution of sexual harassment complaints could be considered a violation of Title IX. (34 C.F.R. 106.8(b))*

Finally, while Title IX may be enforced through private litigation, it is most frequently invoked by a complaint to one or more of the 26 Federal agencies with jurisdiction. 5/ Those agencies have the responsibility for investigating the complaint and prosecuting the school if the complaint proves valid and if a voluntary settlement cannot be negotiated. Ultimately, a school in violation of Title IX could lose all of its Federal financial assistance.

4/ See esp. Continental Can Co. v. Minnesota (Minn. S.C. 1980)

5/ Jurisdiction is established by the provision of Federal assistance. Thus a single school may have Title IX obligations under rules promulgated by many agencies. The Department of Education is considered the "lead" enforcement agency where colleges are concerned.

* Regulations as recodified in Title 34 of the C.F.R. on May 9, 1980; formerly Title 45 C.F.R. Part 86.

Title IX is not the only Federal nondiscrimination statute that applies to the sexual harassment of students, but it is the broadest in scope and the simplest to invoke.

Some states have statutes, executive orders, ordinances, or/and constitutional provisions which are as easily used and fully as powerful as Title IX. Prospective complainants should also check these additional sources of jurisdication.

Civil Suits: Torts

A "tort," loosely defined, is a civil wrong other than a breach of contract. "The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable." 6/ Remedies for tortious wrongs include court orders prohibiting harmful action but are principally awards of money. Tort law provides an avenue for creative litigation, but is traditionally limited to individual rather than class wrongs. Among the recognized areas of tort law which hold great promise for application to incidents of sexual harassment are "assault," "battery," and "words or acts causing mental or emotional disturbance."

Civil Suits: Breach of Contract

Another form of civil suit potentially available to victims of sexual harassment is breach of contract. Under the requirements of the Department of Education regulations implementing Title IX of the 1972 Education Amendments, virtually every postsecondary institution in the country prominently displays a notice to the public that it does not discriminate on the basis of sex. That promise, as an expression of public policy, creates a contractual obligation between the institution and its students. To the extent that instances of sexual harassment violate Title IX, institutions may be liable for breach of contract.

"In frustrated expectations lie the basic stuff of which legal claims are born. In a fundamental sense, all that is required to translate a frustrated expectation into a viable claim is a set of circumstances

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6/ William L. Prosser, Handbook of The Law of Torts, Second Edition, St. Paul, Minn: West Publishing Co., 1955, p. 1.

by which the acts or omissions of institutional personnel in the performance of... [official]... activities can be identified as both the source of the expectation and the cause of its frustration.

"In very broad terms, an institution becomes the source of a claimant's expectations whenever the claimant has a legitimate reason to suppose that the institution will act in a certain way... If contractual stipulations are of any relevance at all in determining... rights and duties in such a context, they will ordinarily operate to enlarge the liability of the institution, not to limit it." 7/

The position that the promise of sex-fair treatment contained in equal opportunity statements made by the institution consitute a "contractual stipulation" is strong on its face. What makes the position compelling is the fact that these promises are engendered by public policy in the form of civil rights statutes, and that the institutions must enter into a contractual agreement with the Federal government to provide equal opportunity as a condition for receiving the assistance which makes them liable under those statutes. (34 C.F.R. 106.4, 106.9)

The importance of breach of contract civil liability lies in the fact that a student need not show any of the harm required under tort law to benefit from a suit; rather, only that the promise has not been kept.

Criminal Action

Just as assault and battery are criminal offenses, so too are many of those acts of sexual harassment grouped under category five: sexual crimes and misdemeanors. Usually, any explicitly sexual acts -- from fondling to self-exposure to rape -- may be prosecuted by states as sex crimes, at least under certain conditions.

The primary drawback to use of this option is the defense that the victim gave consent, and where sexual assault or rape is involved, the necessity for victims to show that force (or the threat of force) was used. Generally, "psychological coercion" (induced by threats or fear that grades or academic position would be lost if the victim did not cooperate) is not likely to be viewed as equivalent to physical coercion. In most cases, there is no criminal prosecution without either a fight or a compelling reason for the lack of a fight.

7/ Ray J. Aiken, John F. Adams, John W. Hall, Liability Legal Liabilities in Higher Education: Their Scope and Management, Association of American Colleges, 1976, pgs. 16-17.

THE PRINCIPALS AND THE CAUSES

There is considerable speculation and disagreement about who harasses, who is harassed or suffers from harassment, and why. The reponses to the Call for Information are too limited to draw conclusions about these sensitive topics, but a number of hypotheses were suggested by the response patterns:

1) Allegations of harassment against school officials indicated that the behavior is often repetitive -- that the complainant is likely to be one of several persons victimized by the same initiator. The appearance of this pattern, particularly where the complainants are unknown to one another, may be a strong indication that allegations are well founded.

2) The faculty involved in the more serious cases seem to be primarily "gatekeepers" -- persons with an unusual degree of influence over the academic careers of the victims. Department heads, graduate advisors, and others with a central role in the victim's area of study were often cited.

3) Male faculty in traditionally male dominated fields are the most likely initiators of generalized anti-woman remarks of a non-salacious type, but hold no special claim to the more suggestive forms of offensive remarks and behavior described by respondents in category one.

4) Younger faculty members who relate to students as "a leader among peers" may underestimate the advantage (and power) they have over students. This may lead in turn to unwitting, but still very destructive, misuses of their positions in an appeal for intimacy.

The causes -- the motives -- of sexual harassment are probably extremely diverse. Some researchers have insisted that the primary motive of harassment involving female victims and male initiators is a desire to exercise power in ways that buttress current patterns of gender stratification in society. Some others disagree, particularly about

those forms of harassment involving "innocent" expressions of sexual interest. Two such responses, the second of which is from a faculty member accused of sexual harassment, follow:

> For us the danger is a Pygmalion fantasy. Those of us who teach college students deal with young people when they are most physically beautiful, most open to new thought and experience. All the while, we get older. It's quite a lure. We meet them vulnerably, because we can see in them our past youth and thus an ideal and ghostly image of ourselves.
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> * * * * * *
>
> When questioned, the professor [described by a complainant as "this young, hip teacher who wore jeans to school"] stated that he had never engaged in any activity which could be interpreted as harassment. Furthermore, he said, "To my knowledge I never used my position as a professor to take advantage of a student." His position, however, does present him with a conflict of interest, he indicated. "My lifestyle is more like a student's than a typical faculty member," he said. "My job is tied in with my social life. I enjoy students and feel very comfortable with them, especially female students."
>
> * * * * * *

Much harassment, especially that involving rewards or punishments meted out by faculty, may simply be what it appears to be on the surface: conscious exploitation of position to obtain privilege. Certainly, nothing in the responses to the Call for Information argued otherwise.

Exploitation of position also appears to be the problem where counselors are involved, despite their relatively limited ability to punish or reward. Propositions or other sexual advances from counselors may be rationalized as "therapy" and for the victim's "benefit" to a greater degree than is normally possible where faculty are concerned. Thus the exploitation "threshold" is much lower for counselors with clients than for most

other professionals with students. This problem is exacerbated by the fact that "proper" therapeutic behavior is not clearly set down, even in many practitioner codes of ethics.

What is clear, however, is that many faculty involved in "innocent" sexual harassment -- and to lesser degrees, promissory or coercive situations -- simply do not appear to recognize the destructiveness of their suggestions to students. This misperception may be due, in part, to the fact that some student/faculty affairs are successful and reciprocal.

One student noted that she felt affairs with faculty were "a kind of reward for being a superior student," a perception that fits neatly with the professor who earlier discussed the Pygmalion theory of motivation. Another student reported remembering "her professor-lover fondly. He influenced her choice of career, determined the subject of her first book, and got her a teaching job. Now in law school, she says about the whole experience, 'It was wonderful.'"

While such stories cannot be used to explain or justify solicitation or threats, they do explain some of the concern felt by faculty members and others who express confusion about what constitutes sexual harassment.

Further, some faculty feel that students provoke the harassment. One commented that "The girls come into my office flashing their thighs, wriggling about in the chair, talking about poetry. Perhaps they don't know what they're doing. But I know -- and I notice it."

The feeling that the victim causes the harassment by her provocative dress or behavior is shared by many students who attempt to "dress down" after an unwelcome overture. As several of the anecdotes indicate, however, avoidance behavior has only limited value, and those limits argue against the theory that harassment of the more severe types is "provoked."

FREQUENCY

Estimates of frequency are beyond the scope of this report. Some researchers have put the figures quite high on particular campuses, but too many variables intervene to permit any reliable extrapolation of these numbers. Some of the most important factors which may affect frequency -- and which need further investigation include: academic status (e.g., undergraduate/graduate), discipline distribution (some forms of harassment appear more likely to occur in disciplines traditionally closed to women, and others in disciplines where close student/faculty relationships are encouraged), institutional control (e.g., secular/religious), availability of adequate grievance procedures, faculty rank/status, and employment (e.g., graduate assistant).

WHAT ARE SCHOOLS DOING ABOUT IT ?

Most of the information available at this writing indicates that sexual harassment is newly emerging only as an issue; it has been a problem kept "in the closet" for many years. As a result of its new visibility, few schools have established procedures to handle sexual harassment. The most effective systems appear to be those which:

1) Include widely publicized prohibitions of sexual harassment;

2) Increase awareness among faculty, other professionals, and students;

3) Have well defined and widely publicized avenues of complaint;

4) Are capable of tailoring sanctions to the nature of the incidents;

5) Recognize the inherently suspect nature of any sexual relationship between students and education professionals; and

6) Utilize systems for the collection of evidence and the speedy evaluation of complaints that do not pit students directly against faculty in tests of credibility.

For the most part, however, institutions have handled complaints of sexual harassment through make-shift or inappropriately designed mechanisms.

Situations which come to the attention of an administrator are handled individually because of the circumstances surrounding the instance. The appropriate person is

apprised which is usually the Dean of the College. In instances where the student was... ambivalent about the relationship, we attempted to counsel the student.

* * * * * *

As you know most incidents of sexual harassment are reported on an informal basis only. Students are not willing to file formal grievances because they fear academic repercussions by involved faculty and negative publicity. Often the case would be the student's word versus the word of the faculty member and would therefore be very difficult to prove in a hearing situation... a formal complaint and hearing process has not taken place on our campus. This is an indication of the difficulty in handling these situations in any formal way.

* * * * * *

In order to report an incident, the student would have to come to an open hearing on accusations of misconduct. The administrator commented 'few students are willing to do that.'

* * * * * *

I spoke with the academic vice-president in early October and related the incidents to him. I asked that there be (a) watch dog committee of some sort... set up that would be public and publicized through the school paper so at least the problem would be acknowledged in public. To this date (late January, following year) there have been no public statements or in-house surveys to assess the problem.

* * * * * *

However, some schools are taking the matter seriously, and as the following notes relate, are working to develop adequate prevention and correction procedures.

> There is evidence that [University of Miami, Florida] women encounter -- sometimes in classrooms and sometimes in offices -- derogatory and dehumanizing remarks about women. Whether or not such remarks are thoughtless or deliberate, women have, nevertheless, found them degrading. Therefore, your thoughtful attention to this matter is requested.
>
> Some of the remarks that UM women complain about are directed at individual women, who are singled out because of their age, sex, physical attributes, or interest in women's rights issues. Other remarks are directed at women in general and express contempt for women and stereotyped assumptions about women's abilities and ambitions.
>
> Such remarks will not be condoned by the administration. I am asking women students to bring complaints of remarks they find offensive to the attention of appropriate deans...
>
> (1978 Memorandum from the President to faculty, students, and staff, University of Miami, Florida)

* * * * * *

A faculty member at San Jose State University in California was dismissed this year following investigation of sexual harassment allegations by students. The recommendation to dismiss was the unanimous decision of a faculty committee, and was endorsed by SJSU President Gail Fullerton. (1980)

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A faculty member at the University of California at Berkeley was suspended without pay for one academic quarter and had a record of the administration's findings on allegations of sexual harassment inserted into his permanent personnel file. (1980)

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The Office of Affirmative Action at Ohio State University has been developing a multi-strategy approach for handling complaints of sexual harassment informally. According to one report, that office puts complainants in touch with support and counseling services, conducts consciousness raising among faculty and students in the colleges where incidents are reported, discusses complaints with department heads and/or other administrators, occasionally discusses allegations with the offender, and researches the history of similar problems in the department concerned. According to this report, the office is receiving considerable support from the university President and Provost in its efforts to make sexual harassment a public issue.

* * * * * *

Early in 1979, Rutgers University president Edward J. Bloustein issued an official memorandum to university personnel which read in part:

Rutgers University reaffirms its desire to create a... study environment for all students that is fair, humane, and responsible -- an environment which supports, nurtures, and rewards... educational goals on the basis of such relevant factors as ability and work performance... Sexual harassment... which imposes a requirement of sexual cooperation as a condition of... academic advancement is inimical to this environment. The university deplores such conduct as an abuse of authority. Whenever knowledge is received that a sex-based condition is being imposed,

prompt and remedial action will be taken... (S)tudent complaints should be filed with the Dean of Students of an undergraduate college, or the Dean of a graduate or professional school.

* * * * * *

A mid-1978 press relase from Stanford University was given wide circulation on that campus and is reprinted in full below:

Moving quietly but firmly in a sensitive area, Stanford has established informal procedures for handling allegations of sexual harassment, on the job or in the classroom.

While the reported frequency of such cases remains quite low, the actual level remains unknown. By publicizing channels for counseling and complaints, both the extent of the problem and the means of resolving it may become better understood.

Sarah Stephenson and John Goheen, of the Ombudsman's Office, report an average of about three cases annually in recent years, mainly involving staff members.

Since becoming Assistant Dean of Students four years ago, Kaplan has handled a handful of cases, mainly involving students and professors.

Kaplan has served as a consultant at Yale, where women students last fall filed a class action suit on sexual harassment against the university. She also participated in a small conference at Harvard this spring. The faculty there has approved procedures for responding to complaints about sexual harassment similar to those developed independently here.

Public conferences elsewhere have drawn unexpectedly high turnouts, with numerous case histories given by women. Two national organizations have already been formed: the Boston-based Alliance Against Sexual Coercion, which offers help to victims, and

the New York-based Working Women United Institute, which is developing a national litigation project in this field. Legislation to forbid demotion or dismissal of workers who refuse to have sex with their boss (sic) was introduced in the California Assembly last month (AB 2858).

There are three avenues for complaints about sexual harassment at Stanford:

- First, Leah Kaplan is available to provide help and counsel to students: If action seems justified, she will notify the Provost of the problem and he and she together will place the problem at what seems to be the best position in the administration to deal with the problem effectively.

- Secondly, the Ombudsman's Office is available for advice and counsel for all persons, but it is especially recognized as an avenue for faculty or staff complaints. Again, if action seems justified, the Ombudsman will notify the Provost in order that the problem can be properly handled.

- Third, the threatened person can appeal to the supervisor of the individual who is thought to be the source of the harassment. Students, staff, or junior faculty may be quite timid about approaching a departmental chairperson or a dean, however. If so, they may use the first two avenues for a less direct approach.

Kaplan has discussed the University's procedures with the Committee on the Education and Employment of Women at Stanford. Both she and Provost William F. Miller believe it is important to sensitize people to potential problems in this area.

Exploitation or role confusion may occur when an individual fails to separate personal from professional roles. "Individuals who might otherwise be regarded as free to consent may feel psychologically coerced," Miller comments.

"Just because individuals can say 'yes' or 'no' doesn't mean that they do not feel pressure."

Individuals who have a dual relationship (that is, a professional as well as a personal relationship) are in a position to psychologically coerce. For example, "faculty should not be in a position to give grades, grants, or recommendations if they have a personal relationship with students," Kaplan notes.

Normally, students with a grievance are encouraged to talk about it directly with the faculty member concerned, then with the department head, and the appropriate dean. This can be exceptionally difficult if the professor is in a position to wield academic power for personal favors.

Appealing to other professors isn't easy, either. Most are reluctant to delve into the private lives of their colleagues; those lacking tenure can find themselves professionally threatened if they try to do so. Those aggrieved almost universally are women; the higher an appeal is taken, the more likely it will become a matter between men.

If students perceive, rightly or wrongly, that harassment simply is not dealt with as an issue by the faculty, litigation of the Yale variety may ultimately result.

Faculty who feel protected may wind up getting clobbered, Kaplan notes. But most students are "not out for blood. The want to restore dignity and clarity to their relationship" with professors in class.

It is not sex so much as the exploitation of power which can lead to problems, she adds: "A department head and a teaching assistant aren't evenly matched."

Some of Kaplan's suggestions:

- "Don't confuse roles. If someone is talking about a thesis, don't ask to go out to dinner while you're in the office. By calling at another time, the social role is clear.

- "If you are romantically involved, try to delegate supervisory responsibility over academics or work to another party, so the chance of exploitation is reduced or eliminated.

- "Remember that what one person considers a friendly arm gesture may be interpreted as a sexual overture by another."

"I tend to be a toucher myself," Kaplan says. "At a time when women need mentors, I hope this won't make men pull back for fear of the risks involved.

"I don't see it as a huge problem. But it's important to be responsive to these concerns, rather than to simply bury our heads in the sand and deny they exist."

Sometimes harassment may not follow traditional lines: a male graduate student may be perceived as making overtures to a female professor, for example, or concerns may arise over what are interpreted as homosexual approaches. But the same suggestions apply.

The few cases which have arisen so far have followed "a labored, crazy route" through various offices, Kaplan notes. By clarifying her own availability to students and the Ombudsman Office for staff, the red tape may be reduced, problems analyzed, and hopefully resolved at an earlier stage.

* * * * * *

Of particular interest in the preceding examples is the way "due process" is provided to the accused officials. Where job actions seem warranted -- as by allegations involving the more serious types of sexual harassment -- some measure of confrontation between principals may be justified, but this is not certain even here. A few institutions have gone to great lengths to safeguard the identities of student complainants, in even the most serious circumstances. According to a January 9, 1980, article in the Los Angeles Times, for example, the incident at the University of California, Berkeley, was resolved without any direct confrontation between the student complainants and the accused;

The complaints (dating back to 1977) against Hermassi surfaced last spring after protests by (a student group). Although he was never officially named in public, his identity as the accused was well known on the campus. Some news publications used his name.

The professor's accusers were never identified publicly and a controversy arose over whether he was being denied his right to confront them.

Finally, the university appointed Professor Susan F. French of the University of California, Davis, Law School, to conduct a confidential investigation of the charges. Her report was not made public. But a statement issued by Chancellor Albert H. Bowker said the report had led the administration to conclude that "misconduct warranting discipline" had occurred.

Bowker conceded that some of the alleged misconduct was "in itself minor or the circumstances ambiguous." Much of the behavior, he said, had occurred when the professor was "suffering personal emotional distress" and it had ceased after he received a reprimand from his department.

Most of the alleged misconduct took place when the students were not enrolled in the professor's classes and no complainant "suffered direct academic injury" from his actions, Bowker said.

The statement, which did not refer to Hermassi by name, said that the university doubted whether there was sufficient evidence that the professor offered grades in exchange for sex to sustain the university's burden of proof in a formal adversary hearing.

But, Bowker went on to say, severe discipline was necessary because the conduct took place "within the general framework of the academic setting and the professor-student relationship." The Chancellor said that the complaining women students had avoided the professor and his classes out of fear of unsolicited sexual attention.

"The professor's conduct thus caused some students to alter their academic plans or impaired students' educational opportunities by preventing unconstrained academic interchange with him," Bowker said.

Noting that "national attention" had been focused on the issue of sexual harassment, Bowker said such conduct was "impermissible and will not be tolerated."

* * * * * *

CONCLUSION

The study of sexual harassment is far too complex a process to be completed in a report based on limited exploratory research, and this report is not intended to provide more than a broad-brush outline of the problem. The concluding statement in the preceding anecdote by then-chancellor Bowker, who is now Assistant Secretary for Postsecondary Education in the U.S. Department of Education, addresses directly the central problem and consequence of sexual harassment in any form: that it inhibits "unconstrained academic interchange." While the individual human circumstances of almost all incidents of sexual harassment must be considered in weighing their seriousness and the appropriate institutional response, there is an underlying ethical obligation implicit in education to provide unconstrained academic interchange. The use of the classroom for social or sexual interchange cannot be allowed to diminish the learning experience.

PART II:

TECHNICAL SUPPLEMENT

INTRODUCTION

Part II of the report contains a number of appendices and several chapters on technical or other topics of interest to a fairly narrow audience. They have been separated from the main text to enhance the readability of the report as a whole, and to provide additional insight into some of the more complex points raised in Part I.

METHODS

Portions of this report are based on responses to a "Call for Information" circulated by the Council throughout the education community during academic year 1979-80. The Call, reprinted at Appendix A, was designed to collect qualitative and descriptive data about incidents of sexual harassment involving student victims. No attempt was made to develop a data base which could yield reliable projections of the frequency with which sexual harassment occurs, and none of the studies or literature brought to the Council's attention during the course of this project permit national projections.

Targeting

Higher education institutions were the primary target group of the Council's Call, and all but a few of the responses alluded to incidents in that setting. Over 8,000 copies of the Call were mailed in the Fall of 1979, of which over 6,000 were addressed to administrators and student governments on each of the nation's campuses. This direct contact effort was supplemented by mailings to campus women's centers, state and national student organizations, advocate groups, and professional education associations. Information about the project was also disseminated by many newsletters, journals, and other print vehicles. This provided a greater distribution of the Call among the vast target population than the Council's direct contact effort.

No direct contact was made with schools at the K-12 level. There the Council relied on mailings to state education associations and professional organizations.

In the Spring of 1980, a follow-up mailing to the original Call was sent to non-campus groups included on the earlier mailing list.

This targeting procedure contributed greatly to the response configuration within the higher education community, and appears to be the primary cause of the limited response from community and other two-year institutions (i.e., information sharing networks within these institutions are notoriously weak, and the spread of knowledge about the Call among students and other interested parties was limited.)

Responses: Type of Institution

The Call specifically requested information about the nature of the institution at which reported incidents occurred. Of the 259 responses, 192 contained information of this type. Although the targeting and other methodological factors severely limit the usefulness of these responses in measuring frequency or distribution, the data do indicate that incidents of sexual harassment are not confined to any particular type of institution. Incidents were reported at large public institutions, small public institutions, vocational schools (two and four year), private institutions, and religiously affiliated institutions.1/

Responses: Type of Respondent

Three types of resondents submitted most of the responses to the Call: victims, second parties, and researchers.

116 responses were from victims. These responses usually (92%) included accounts of incidents in which other parties were victims, as well. Another point of interest in these accounts was the almost universal tendency (95%) to describe the initiator of the harassment as a person with a history and continuing practice of similar incidents.

Many (40%) of these responses were handwritten; a substantial number (26%) were telephoned in to the Council or provided through personal visits. Most (80%) provided detailed information of a highly explicit nature. While most (80%) recounted incidents which had taken place in the recent past, some dealt with incidents a decade or more in the past. Invariably, the responses concerning events more than a few years past were accompanied by statements indicating that there had been no opportunity to report the incidents when they occurred. Almost all of the respondents in this group indicated that they continued to feel some form of emotional distress over the incidents despite the passage of years.

While most (60%) responses described allegations involving undergraduate settings, many (46%) reported graduate schools as the site of at least one harassment incident.

1/ A number of institutions with strong religious affiliations responded to the Call with communications indicating that no incidents of sexual harassment were known to the correspondent.

Self-described victims of sexual harassment were also the primary source of information about non-sexual actions which may be described as sexual harassment (e.g., the inculcation of sex-role stereotypes). This material surfaced largely because the Council refrained from defining "sexual harassment" in the Call; virtually all previous research has delimited the phrase to mean only acts which have an explicitly sexual content.

Finally, victims tended to describe initiators as persons of considerable station, influence, and power. Most respondents (62%) identified departmental chairmen or others with quasi-administrative roles as initiators.

43 responses were from secondary sources. These included media accounts, reports from administrative/academic personnel with an official interest in the problem, friends of victims, staff from women's centers, parents of victims, and others. 96 responses from primary victims also contained second-hand information about incidents involving others, but these are not included in the figure above. The wide range of secondary sources significantly diminishes the possibility of validating patterns from secondary data. Where patterns can be detected, however, they tend to support those developed from primary data. Specifically, most (74%) reported incidents in which a single person was responsible for initiating multiple incidents of harassment. Significantly, this group of respondents frequently (60%) cited incidents which went unreported to institutional authorities, usually because of the victims' apprehensions about the consequences of reporting and/or embarrassment.

7 responses were from researchers involved in major projects. Typically, each researcher had extensively interpreted the results of some form of study or survey which was limited to a single campus. Often the data base of these respondents was quite large, and in one instance numbered nearly 300 victims. One respondent in this category surveyed the entire student population of a small college and supplied the Council with both raw and analyzed data. For the most part, however, responses from researchers were treated with caution since raw data were not available in their reports.

Responses: Type of Harassment

Only data from victims and secondary sources were used to indentify the major types of incident within the meaning of "sexual harassment," since a primary purpose of the Call was to develop a body of anecdotal information which could yield a definition of sexual harassment. This approach is in sharp contrast to investigations which have supplied definitions. Some respondents supplied information extraneous to the study (e.g., about employment-related experiences) and were discounted. The remainder reported five distinguishable types of incident,[2/] described in the text:

1) Generalized sexist remarks or behavior (38 allegations);

2) Inappropriate and offensive, but essentially santion-free, sexual advances (81 allegations);

3) Solicitation of sexual activity or other sex-linked behavior by promise of rewards (34 allegations);

4) Coercion of sexual activity by threat of punishments (92 allegations); and

5) Sexual assaults (18 allegations).

The methodology of this study precludes any reliable projections from this distribution pattern about the actual or relative frequency with which these types of incidents occur. In many cases, students do not perceive the same event in the same manner; some but not all students may term any particular behavior "sexual harassment." This appears to be due primarily to different standards established by each student about when sexual or gender-linked behavior becomes "sexual harassment." For example, some students (and one researcher) specifically noted that sexual crimes (e.g., rape, sexual assault) should not be defined as "sexual harassment."

2/ Many allegations were too poorly described to be placed in any particular category, and are omitted here. Statements by respondents to the effect that an unspecified number of incidents similar to those explicitly reported had taken place are also omitted from this count. A more liberal reading of the data might have tripled or quadrupled the numbers of allegations, but the distribution pattern would have remained relatively constant.

DISCRIMINATORY SEXUAL HARASSMENT

In its broadest sense, sexual harassment is any objectionable emphasis on the sexuality or sexual identity of one person by another. The law prescribes relief to victims of sexual harassment in general proportion to the damage suffered, and under some circumstances prohibits sexual harassment as a form of sex-based discrimination. This report deals primarily with those forms of sexual harassment which constitute sex-based discrimination, and which involve students in a postsecondary education setting.1/

Common Denominators

The range of behavior which can be characterized as "sexual harassment" is so great that considerable confusion has developed around the meaning of the phrase. Accordingly, most of those writing on the problem have adopted partial definitions which do not translate well into different contexts. Two factors are common to all definitions, however, and provide both the necessary and sufficient elements of a meaningful definition in themselves:

- All forms of sexual harassment involve emphasis on the gender of the person harassed, either sexually or through sexual stereotyping; and
- The person harassed (the victim) finds the sex related emphasis objectionable (the motive or intent of the initiator is secondary; the disposition of the person acted-upon is the primary determing factor).

Obviously, then, not all forms of sexual harassment are illegal, although all have at least nuisance value.

1/ The report is limited to postsecondary education settings because the Council received too few responses to formulate findings about the problem at any other level of education. There is evidence to suggest that the problem does occur at other levels of education, and the Council may investigate those settings at a later date.

Illegal Sexual Harassment

Once an act is identified as sexual harassment, a number of additional criteria must be present to make it illegal (i.e., actionable) under Federal nondiscrimination laws.

Under Federal laws, some forms of sexual harassment in employment have been increasingly regarded as prohibitied discrimination. The facts most in evidence where the courts find employment related sexual harassment to be a form of prohibited sex-based discrimination are:

- The victims of record are of only one sex; and
- The initiator is in a position to affect the terms or conditions of the victim's employment; and
- The harassment has a verifiably adverse impact on the victim (i.e., it is not trivial)

While Executive Order 11246,[2/] as amended, and a growing number of statutes also prohibit sex-based discrimination in employment, almost all Federal involvement on the question of employment related sexual harassment as illegal discrimination has been litigation brought under Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e, et seq.).

The leading Title VII sexual harassment case is Barnes v. Costle (561 F. 2d 983). Here, the District Court for the District of Columbia originally found against the plaintiff, a woman who was being penalized in her job for having refused the sexual advances of her supervisor, on the grounds that sexual harassment did not constitute sex discrimination. The Court contended that, "The substance... is that she was discriminated against, not because she was a woman, but because she refused... a sexual affair with her supervisor." On appeal, the D.C. Circuit Court reversed, declaring that discrimination was involved since the declined invitation had been issued only because plaintiff was a woman. As such, it presented an employment condition based on her gender.[3/]

2/ In relevant part, Executive Order 11246, as amended, prohibits sex discrimination in the employment policies or practices of Federal contractors.

3/ The court further noted that the fact that not all female employees were similarly affected did not matter since the statute involved, Title VII of the 1964 Civil Rights Act, extends protection to individuals.

In April 1980, the Equal Employment Opportunity Commission, which administers Title VII, issued interim guidelines containing the following definition of illegal sexual harassment:

> Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

These guidleines were designed to formalize the EEOC's position that Title VII extended to sexual harassment, and to further guide the courts in determining the scope and nature of employer liability for the discriminatory sexual harassment of employees. That such guidance was necessary, despite Barnes[4/] and such companion cases as Miller v. Bank of America (20 FEP Cases 462 (9th Cir. 1979)), is evident from recent District Court decisions which have attempted by various means to reduce the degree of employer liability described in Barnes and Miller.[5/]

The EEOC guidelines, read against the main line of Title VII employment cases, show that discriminatory sexual harassment in an employment context has the following characteristics:

- It is objectionable ("unwelcome") to its recipient (voluntary relationships are not prohibited); and
- The content of the act is a demand for sexual activity and/or other conduct of a sexual nature; and
- The victims of record of any particular initiator are members of only one gender; and
- It may be established by either the intent of the initiator or the effect of the action; and

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4/ Barnes v. Costle, supra.

5/ See, for example, Vinson v. Taylor (22 EPD 30,708 (D.D.C. 1980)).

- Initiators may be any persons in a position to substantially affect the working environment or terms and conditions of the victim's employment; and

- The employer is liable for failure to protect or provide appropriate relief to the victim.6/

Title IX

The primary Federal Statute which prohibits sex discrimination against students as students is Title IX of the 1972 Education Amendments (20 U.S.C. 1681, et seq.). While Title IX does not explicitly prohibit sexual harassment, the implementing regulations for Title IX issued by the Department of Education (34 C.F.R. Part 106), the Department of Energy (10 C.F.R. Part 1040), and the Department of Agriculture (7 C.F.R. Part 15a), provide a number of points at which such coverage can be readily construed.7/

While litigation and agency rulings under Title IX could develop independently, it is more likely that they will follow closely the lines established by Title VII.

6/ EEOC holds that employers are liable for all acts of sexual harassment, "regardless of whether the employer knew or should have known of their occurence" except sexual harassment by co-workers. Some courts have held, however, and EEOC agrees where co-workers are involved, that an employer must have had "actual or constructive knowledge" to establish liability. See "Institutional Liability," infra.

7/ Under the ED regulations, the following sections are relevant: 106.21(a), (b)(1), (b)(3) on admissions; 106.23(a) on recruitment; 106.31(a), (b)(1), (b)(2), (b)(3), (b)(4), (b)(8) on the operation of education programs and activities; 106.36(a) on counseling; 106.37(a) on financial assistance; 106.39 on health and insurance benefits and services; 106.41 on athletics.

Setting aside for later discussion the question of content, the characteristics of discriminatory sexual harassment in an employment context may be refined and applied to an educational context in the following manner:

- It is objectionable to the victim(s); and
- The victims of record of any particular initiator are of only one sex; and
- The intent or effect of the act was harmful to the victim; and
- The institution cannot show that it has protected or provided relief to the victim.8/

The content of "discriminatory sexual harassment" under Title IX may be justifiably expanded from the explicitly sexual offense contemplated by EEOC and the courts under Title VII, to include ojectionable emphasis on sexual identity, as through stereotyping, as mentioned earlier in this section. The explicitly sexual definitions developed in the cases and EEOC guidelines are the result of dealings limited to what has been presented to the courts -- no court has yet ruled on the question of whether only imposition of sexual demands per se are illegal sexual harassment.

In addition, the Title IX regulation explicitly prohibits different treatment of students on the basis of sex (e.g., 106.31(b)(1) and (4)), a very sweeping form of protection not as clearly articulated under Title VII.

Furthermore, the relationship between a student and an educational institution is different in many important respects from the relationship of an employee to an employer; e.g., the student is actively purchasing education by payment of tuition and fees.

Arguably, then, the obligation of the institution to provide a learning climate free of such distractions as sexual harassment is greater than that of the employer and supports a more comprehensive definition of discriminatory sexual harassment.

8/ See the discussion of institutional liability at pages 16-20.

Following this reasoning, the meaning of illegal sexual harassment under Title IX correctly would be defined as any unwanted and harmful introduction of emphasis on the sex of a student in a formal student/institution relationship (e.g., student/faculty, student/counselor, student/administrator). Institutional liability under this expanded concept would accrue exactly as with the narrower context addressed by EEOC's guidelines, although the nature and consequences of liability are somewhat different under Titles VII and IX.9/

For the purposes of this report and its recommendations, then, the appropriate definition of illegal sexual harassment under Title IX is:

> Objectionable emphasis on the sexuality or sexual identity of a student by (or with the acquiescence of) an agent of an educational institution when (1) the objectionable acts are directed toward students of only one gender, and (2) the intent or effect of the objectionable acts is to limit or deny full and equal participation in educational services, opportunities or benefits on the basis of sex; or (3) the intent or effect of the objectionable acts is to create an intimidating, hostile, or offensive academic environment for the members of one sex.

9/ As discussed earlier, Title IX liability puts Federal financial assistance at risk, while Title VII liability does not. While damages may be available under either statute, this is certain as a possibility only under Title VII. Finally, Title IX regulations require a grievance procedure (106.8(b)) while Title VII does not.

TORT LIABILITY

When sexual harassment takes forms which would be offensive to a "reasonable man" and/or the consequences involve social, emotional, or physical injury of severe nature, a violation involving one or more "torts" may be involved. A "tort" is "a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract, for which a court of law will afford a remedy in the form of... damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable."1/ Several torts are well-established as vehicles for obtaining redress in situations resembling some forms of sexual harassment, but it is important to note that a civil suit can be brought under tort law for any "socially unreasonable" wrong that is not a breach of contract. Thus, the opportunities for creative litigation are plentiful. "New and nameless torts are being recognized constantly, and the progress of the... law is marked by many cases... in which the court has struck out boldly to create a new cause of action where none had been recognized before."2/ Fundamental to this process, however, is the fact that "a wrong is called a tort only if the harm which has resulted, or is about to result from it, is capable of being compensated in an action at law for damages..."3/

This principle of compensation is based on both the harm done (actual damages) and the preventive value of punishment (punitive damanges). The degree of compensation available -- closely related to the degree of liability -- is keyed to the degree of social unreasonableness involved.

Liability is established if the perpetrator (the "tort-feasor" or "defendant") has acted with "unreasonable intention" or has "departed from a reasonable standard of care."4/ In this, the law goes beyond what can be shown about the defendant's state of mind, and the defense that the tortious act was not an intentional wrong is frequently denied.

1/ William L. Prosser, Handbook of The Law of Torts, Second Edition, St. Paul, Minn: West Publishing Co., 1955, p. 1.

2/ Ibid., p. 3

3/ Ibid., p. 4

4/ Ibid., p. 6

A court "may consider that the defendant's behavior, although entirely reasonable in itself from the point of view of any man in his position, has created a risk or resulted in harm... which is so far unreasonable that he should pay for what he breaks. Sometimes it must range rather far afield, and look primarily to the social consequences which will follow."5/ Thus, the innocent purchase of stolen property has implications which so threaten the social order that it generates liability; it is the shared burden of buyer and seller to establish legal possession of an article bought and sold.

To the extent, then, that sexual harassment left unpunished harms the community, rather than merely an individual, tort liability for the act may be increased. Perhaps more importantly, the defendant in a sexual harassment case may be guilty despite his failure to appreciate the "wrongness" of his actions: he may have a "tort obligation," in effect, to exercise special care in these matters.

Of the existing, named torts with special applicability to sexual harassment, three have particular promise for victims: assault, battery, and intentional infliction of mental or emotional disturbance. In each case, liability is generally understood to be progressively greater as the defendant's acts move from the merely inadvertent, to being negligent of likely consequences, to constituting intentional invasion of another's rights under the mistaken notion that no wrong is being committed, and finally to instances where the motive is a "malevolent desire to do harm."6/

"Intent," in these torts, refers not to meaning to do harm, but only to meaning to do the thing which ultimately resulted in a harm. So, "intent" may be established when the actual consequences of an act are not part of, or even contradict, the defendant's motive.7/

Battery is an intentional and unpermitted contact, other than that permitted by social usage. The contact may be with the body or with clothing, or anything else with which the plaintiff (the victim bringing the suit) is in contact with or connected to. "The gist of... battery is not the hostile intent of the defendant, but rather the absence of

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5/ Ibid., p. 6.

6/ Ibid., p. 29.

7/ Johnson v. McConnel, 1878, 15 Hun, N.Y. 293 (defendant intervened in a scuffle to protect plaintiff, and broke plaintiff's leg).

consent to contact on the part of the plaintiff. (citation omitted) The defendant may be liable where he intended only a joke (citation omitted), or even a compliment, as where an unappreciative woman is kissed without her consent. (citation omitted) The plaintiff is entitled to protection according to the usages of decent society, and... contacts... contrary to all good manners, need not be tolerated. (citation omitted)" Further, "... even... innocuous and generally permitted contacts may become tortious if they are inflicted with knowledge that the individual plaintiff objects to them, and refuses to permit them. (citation omitted)" 8/

Therefore, the "unwanted touching" which characterizes so many incidents of sexual harassment may be actionable under the tort of battery.

Assault is an intentional act, short of contact, which produces apprehension of a battery. "Apprehension" is distinct from "fear," in that the victim need not be afraid of the proposed battery, but only be aware of it.

Words and acts causing mental or emotional disturbance is a relatively new tort, and the offense prompting it must usually be flagrant in nature and extreme in effect. Still, it is here that acts of sexual harassment (other than battery) have the greatest potential liability.

Actionable offenses under this tort include those which may cause purely mental or emotional distress -- although "not only fright and shock, but also grief, anxiety, rage, and shame are in themselves 'physical' injuries in the sense that they produce well-marked changes in the body, and symptoms that are readily visible to the professional eye (citation omitted)." 9/

Where special obligations to the public are a characteristic of the defendant (common carrier: Chamberlin v. Chandler, C.C. Mass. 1823, 3 Mason 242, 5 Fed. Cas. No. 2,575; innkeeper: Emmke v. De Silva, 8 Cir., 1923, F. 17) special liabilities frequently accrue and diminish the necessity of showing that the tortious acts were outrageous in kind, intent, or effect. Misuse of authority may also give rise to action under this tort (Janvier v. Sweeney, (1919) 2 K.B. 316, 88 L.J. K.B. 1231)).

8/ Prosser, p. 32-33.

9/ Ibid., p. 39.

"There must be some convincing evidence that the mental suffering is genuine and extreme. Liability... cannot be extended to every trivial indignity... Thus far it has been held that no action will lie for the insult involved in inviting a woman to illicit intercourse (citation omitted), 'the view being, apparently, that there is no harm in asking.' (citation omitted)."[10] When the woman is a student, however, and the man a teacher or counselor, the "harm in asking" may be more persuasively apparent, especially if it is repeated in spite of rejection -- or if the request is heard as a command.

Where civil suits are brought under tort law, an employer may be held liable for the actions of an employee under the doctrine of respondeat superior,[11] or other theories of universal responsiblity. Thus, a common carrier (railroad) may be liable for the tort committed by one of its employees (conductor) and so the college for the behavior of its faculty.

Finally, torts may be simultaneously violations of criminal, constitutional or other law, and may be developed under any applicable jurisdiction. Battery, for example, may be both a crime and illegal discrimination.

10/ Ibid., p. 45-46.

11/ Literally, let the master answer (for the acts of chattel).

INSTITUTIONAL LIABILITY

Under certain circumstances, an educational institution may become liable for the sexual harassment of its students. This liability may originate from contracts, tort law, ordinances, statutes, regulatory provisions or rules, or constitutional provisions. The source of liability generally determines whether a claim may be pressed through the courts or by administrative processes. Detailed examination of non-Federal liability is not within the scope of this report.1/

Respondeat Superior and Jurisdiction

The threshold element in any litigation is jurisdiction; and whether state or Federal law is at issue, the principle of institutional liability for the acts of individuals appears to stem primarily (but not exclusively) from the doctrine of respondeat superior; literally: Let the master answer.

> Under this doctrine master is responsible for want of care on servant's part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment.
>
> Black's Law Dictionary, 4th Ed.

An evolving line of Title VII (1964 Civil Rights Act) cases is establishing the limits of employer liability under various interpretations of this doctrine for the sexual harassment of employees, but as yet no significant applications have found their way into case law where students are the victims.

Arguably, however, an educational institution owes at least equal "duty to use care" to its students as does an employer to its employees, particularly where that duty is defined by two Federal civil rights

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1/ State laws vary considerably in application, but see: Part I, Chapter 5, and Part II, Chapter 4, of this report.

statutes as similar in effect as Title VII and Title IX (1972 Education Amendments).[2/] Title VII cases and agency interpretations on this issue are therefore highly likely to be transferable to a Title IX context, except where Title IX places a greater or explicitly different type of obligation on educational institutions with regard to students. As Buek noted in the Council's 1978 memorandum on sexual harassment, "... the underlying question is whether an illegal condition has been imposed upon receipt of benefits, whether those benefits are in the form of educational services or job opportunities."[3/]

Substantive Elements

Once jurisdictional disputes are resolved, most of the Title VII litigation on sexual harassment has turned on one or more of three elements: proof, notice, and consequence. The EEOC guidelines on sexual harassment also address each of these elements. Consequently, each requires some discussion in order to establish its potential extrapolation to sexual harassment complaints prosecuted under Title IX.

A. Proof

Plaintiffs are required to convince the court that the incident occurred as alleged. Normally this requires evidence from a witness, or a preponderance of corroboration (e.g., evidence, testimony, etc.). The burden on plaintiffs in this regard is traditionally high, due, at least in part, to the widespread belief that allegations involving sexual offenses are easy to make and difficult to disprove. However, as several authors have pointed out, women pressing such allegations may have more to lose than to gain.

2/ The specific language of Title VII differs considerably from that of Title IX, despite the fact that both have the fundamental purpose of prohibiting discrimination. Title VII, for example, explicitly addresses employers (a term statutorily defined to include agents thereof) while Title IX addresses potential victims (i.e., "No person... shall be... subjected to discrimination..."). This difference in construction should not obscure the fact that the statutory beneficiaries in each case are victims of sex discrimination. In a close reading however, it is evident that Title IX prohibits discrimination, per se, while Title VII prohibits discrimination by a specified agent (employers). Title IX may thus eventually be construed to have greater breadth in this regard than Title VII.

3/ See also Alexander v. Yale, 459 F. Supp. 1 (D. Conn, 1979).

> Given women's feelings of humiliation and intimidation from the incident, together with the condescension, ridicule, and reprisals that women who report sexual harassment suffer -- reactions which legal sanctions might as well be expected to increase as decrease in the short run -- it seems unlikely that significant numbers of reports would be fabricated... The total cost in terms of reputation, energy, distress, legal fees, and employment opportunities would seem to present sufficient disincentives to pure fabrication...
>
> (MacKinnon, p. 97)

Establishment of a pattern by showing that similar offenses have been committed with other victims does not prove that the disputed incident occurred, although it may buttress the original charge. (See Vinson v. Taylor, 22 EPD 30, 708 (D.D.C. 1980), footnote 1 of the opinion).

B. Notice to Employer

The leading Title VII case on this issue, Miller v. Bank of America, 20 FEP 462 (9th Cir. 1979), held that plaintiff was not required to give formal notice to the employer, or to use available internal grievance procedures prior to filing suit. EEOC, in its April 1980 interim guidelines on sexual harassment, has also ruled that Title VII liability is not dependent on formal notice by plaintiff.

Several Federal District Courts, however, have ruled that a precondition for a valid Title VII charge is "ratification" of the sexual harassment by the employer.[4/] This is shown by evidence that the employer had "actual or constructive"[5/] knowledge of the incident, and acquiesced in it by inaction.[6/]

4/ Luddington v. Sambo's, 20 FEP Cases 1000 (E.D. Wisc. 1979); Neidhardt v. D.H. Holmes Co., 20 FEP Cases 452 (E.D. La. 1979); Vinson v. Taylor, supra.

5/ I.e., the employer knew or should have known.

6/ See also Alexander v. Yale, supra.

Pending review by the Supreme Court of one or more Circuit decisions, however, the EEOC guidelines, read with Miller,[7] are viewed as controlling.[8] Those guidelines clearly assign Title VII liability regardless of whether the employer knew or should have known of the sexual harassment (except where co-workers are the initiators), and permit suit without exhaustion of administrative remedies (e.g., use of internal grievance procedures).

However construed, the notion of notice implies that an employer may shield itself from liability by taking action on behalf of the victim.

C. Consequence

Most District Court decisions[9] have required plaintiff to show an adverse relationship between the sexual harassment and the plaintiff's terms or conditions of employment. The EEOC guidelines support this view, but construe it liberally to include as actionable acts those: "... creating an intimidating, hostile, or offensive working environment."[10]

Implications for Title IX

Title IX may have greater statutory breadth on this issue than Title VII in their respective jurisdictions, primarily because the language of Title IX prohibits discrimination per se, regardless of source, while Title VII prohibits discrimination by employers. The host educational institution thus has a more inclusive statutory obligation to its students under Title IX than does an employer to its employees under Title VII.

7/ Miller v. Bank of America, supra.

8/ Unless serious conflict develops within the Circuits.

9/ Bundy v. Jackson, 19 FEP Cases 828 (D.D.C. 1979); Smith v. Rust Engineering Co., 20 FEP Cases 1172, 1173 (N.D. Ala. 1978); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1389, 20 FEP Cases 251, 255 (D. Col. 1978); and Vinson v. Taylor, supra.

10/ EEOC Interim Guidelines, infra.

Among the potential implications of this 10/ might be a lower threshold of consequence necessary to establish an actionable claim, and less emphasis that notice be provided by the victim to the school. Under the Title IX regulation promulgated by the Department of Health, Education, and Welfare, for example, different treatment of students on the basis of sex in the provision of benefits, opportunities or services may alone constitute prohibited sex discrimination.

On the question of proof that a charge is valid, however, the distinctions between Titles VII and IX appear to have little bearing. Administrative processes generally require a lesser standard of proof at the stage of initial findings, but the proof requirement for actual enforcement under Title IX would be a preponderance of evidence, as with Title VII.

10/ The regulatory language of Title IX, as set forth at 34 C.F.R. 106 (ED) supports this view. The discussion here, however, has not been explicated in case law.

MANAGING LIABILITY

As noted repeatedly in this report, colleges and universities are liable under multiple jurisdictions for acts of sexual harassment involving institutionally affiliated principals. While that liability takes different forms and so calls for different preventative and responsive liability management strategies, much of the liability may be shed by the effective use of internal grievance systems. Such systems can provide a real benefit to victims, as well, by providing prompt and equitable relief, and to accused initiators by providing a less destructive forum for disposition of complaints than most external enforcement systems permit.

Grievance Procedures and Liability

Title IX of the 1972 Education Amendments requires universities to: "adopt and publish grievance procedures providing for prompt and equitable resolution of student... complaints alleging any action which would be prohibited by this part." (34 C.F.R. 106.8(b))[1/] Hence, the absence of an effective grievance procedure itself creates liability under Title IX, which is also the primary source of Federal liability for the sexual harassment of students.

Moreover, while Title VII does not require employers to maintain grievance procedures, almost universal agreement has arisen in Title VII sexual harassment cases that there is no cause for judicial action if the employer takes prompt and remedial action upon acquiring knowledge of an incident.[2/] Under Title IX, as well, it is a matter of general policy that enforcement agencies do not prosecute for wrongful acts voluntarily remedied.

1/ An "...action prohibited by this part" refers to any prohibited sex-based discrimination, including sexual harassment. In the analysis of changes to the proposed HEW regulation, the Department noted that the purpose of the grievance procedure requirement was to "facilitate compliance and prompt correction of complaints without resort to Federal involvement." (40 FR 108 (24129))

2/ See esp., Tompkins v. Public Service Electric and Gas Co., 422 F. Supp. 553, (D. NJ, 1976), reversed and remanded, 568 F.2d 1044 (3rd Cir., 1977).

These facts argue persuasively that any liability management strategy should have at its core some form of grievance procedure capable of the "prompt and equitable resolution" of sexual harassment allegations. Such a procedure is not only universally desirable from the perspectives of each principal party, but its absence creates an independent risk to continued receipt of Federal funds.

Prevention and Liability

Before examining the threshold criteria for satisfaction of the promptness and equitability requirements in grievance procedures, it is important to discuss one other necessary facet of any successful liability management strategy: prevention. As the Equal Opportunity Employment Commission noted in its recently published guidelines[3] on liability under Title VII (1964 Civil Rights Act) for the sexual harassment of employees:

> ... the best way to achieve an environment free of sexual harassment is to prevent the occurrence of sexual harassment by utilizing appropriate methods to alert the employees to the problem and to stress that sexual harassment, in any form, will not be tolerated."
>
> 45 FR 72, April 11, 1980
> p. 25024

Examples of preventative measures taken by several schools are presented elsewhere in the report,[4] but even the most comprehensive of those illustrations fall short of constituting a full-fledged preventative strategy. The EEOC guidelines, which are binding on virtually all postsecondary institutions,[5] suggest a number of elements which "might be deemed necessary" in demonstrating that an employer has fully discharged its obligation to prevent sexual harassment: affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned. (29 C.F.R. 1604.11(e)) These elements transfer to the Title IX context quite well.

3/ April 11, 1980; 45 FR 72, pgs. 25024-25. "Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, As Amended: Adoption of Interim Interpretive Guidelines." (29 C.F.R. 1604)

4/ See Part I, Chapter 8.

5/ The EEOC guidelines apply only to employment.

Prevention plays at least as central a role in limiting the incidence of sexual harassment involving student victims as it does where employees are concerned. The absence of a preventative strategy has not yet been construed as producing independent liability under Title IX; however, there is nothing in the statute or the present regulation which would prevent Federal agencies with jurisdiction from promulgating guidelines which do so, and OCR officials have stated publicly that such guidelines are under development.6/

Subsequently, any sound liability management strategy should contain both preventative elements such as those enumerated above and a "prompt and equitable" grievance procedure.

Grievance Procedures: Promptness

Neither Title IX nor, according to controlling judicial and agency interpretations, Title VII requires a victim to exhaust internal review procedures before bringing agency action. This means that in a "worst case" situation, an institution might receive its first notice of a possible violation of either statute from the enforcement agency investigating a complaint. While such a situation might appear at first glance to deprive an institution of the opportunity to discharge its liability, in fact it merely provides some basic procedural and time-line guidance.

Both statutes emphasize the importance of attempting to achieve "voluntary compliance," that is, adequate corrective action undertaken without agency or judicial coercion. If an institution uses a Federal notice of complaint letter to trigger its internal grievance system, and if that system appears likely to deliver an 'equitable" resolution of the complaint in a "prompt" manner, enforcement action may well be circumvented.

Since a complaint under either Title IX or Title VII is valid only if filed within 180 days of the alleged incident, a "prompt" grievance procedure must fit this timeframe to be useful in preventing complaints to Federal agencies. The 180 day mark is also important in "worst case" Title IX situations since that statute is enforced (by the Department of Education) on fixed timelines set by a court order7/ which allots 90 days for complaint investigation and an additional 90 days for negotiation of "voluntary" compliance.

6/ "Higher Education Daily, July 10, 1980, p.6.

7/ WEAL v. Harris, Civil Action No.74-1720 (D.D.C., December 29, 1977).

Thus even where the institutional grievance mechanism is triggered by a notice from a Title IX enforcement agency of a pending investigation, that agency could defend a decision to await the outcome of an internal grievance process *if* the process were sufficiently prompt (less than 180 days, including appeals), *provided* the process was reasonably certain to result in an "equitable resolution."

Grievance Procedures: Equitable Resolution

A grievance procedure which is prompt but biased is likely to be by-passed by knowledgeable victims in favor of Federal agency intervention or litigation. If used, the findings of a biased procedure are unlikely to withstand either agency or judicial scrutiny, and may contribute to liability.8/

Subsequently, institutions using grievance procedures as a liability management tool should make certain that "equitable resolution" of complaints is likely.

No direct judicial guidance is available on the characteristics of a grievance procedure adequate to the demands imposed by student complaints of discriminatory sexual harassment. It is apparent, however, that as part of a liability management strategy the ideal system will be one which is actually *used* by students, and which produces persuasive findings after a thorough fact-finding, review and appeal process which protects the contending parties' rights and reputations. Further, the process should culminate in the award of carefully tailored relief, where the findings merit it, as well as such corrective and punitive actions as prove warranted. Such a system would not only work to deflect agency involvement, but would also establish a powerful obstacle to litigation, even while providing the contesting parties with a highly desirable situation in which to resolve the problem and protecting the learning environment of the institution. To the degree that the system does not achieve these things, its legal (and ethical) value will decrease.

8/ A demonstrated failure to provide "equitable resolution" of a complaint processed in a grievance procedure could be *in itself* a violation of Title IX, section 106.8(b).

Equitable resolution is contingent upon equitable process. However, few existing grievance procedures for student complaints are well suited to sexual harassment issues, and employment models are generally too clumsy to transfer well into the student context. The procedures reviewed in the development of this report, however, provide some practical guidance about the special needs of the issue, victims, and accused parties.

- Grievance procedures should be sufficiently flexible to accommodate the wide range of incidents which fall under the rubric of sexual harassment. Generally, the process should be responsive to the situation, and should be only as formal as the allegations under review are severe. Complaints about sexist epithets in the classroom, for example, are not well handled by a process that pits the parties against one another in front of a faculty review panel. Conversely, the confidential appointment of a special, impartial investigator where allegations of sexual coercion are involved proved very effective, albeit unorthodox, on one campus. The opportunity to resolve complaints informally, with the more formal procedure following if the complaint cannot be resolved is often effective.

- The institution should undertake independent discovery. A complainant who does not adequately document her/his allegations may feel compelled to call upon external resources (such as Federal enforcement agencies) for assistance. Moreover, it is in the best interests of the academic environment to ascertain as fully as possible both the validity of individual charges and the scope of the problem -- much of which may be beyond the ken of any particular complainant.

- Confidentiality should be maintained. Reprisals and damage to reputation are frequent consequences of pressing a sexual harassment complaint. Few types of complaint, and none at an initial stage of discovery, require disclosure of the complainant's identity. (To the extent possible, especially at the early stages of discovery, the identity of an accused party should be protected; this may become difficult if corroborative testimony becomes necessary.) Since the identity of complainants almost always becomes public during judicial and agency proceedings, confidentiality is a strong inducement to use the institutional system.

- The threshold for punitive sanctions should be set at that point where the harassment denies "unconstrained academic interchange" or otherwise impairs the full enjoyment of services or opportunities. The best known example of this was the censure and suspension without pay for one academic quarter of a faculty member at U.C. Berkeley in January 1980 for activities which could not be shown to have resulted in any "direct academic injury" by the complainants.9/ The importance of punitive sanctions as a preventative device and in providing relief to successful plaintiffs is increasingly recognized by the courts.10/

- Impartiality must be maintained. At many schools, potential complainants are confronted with the prospect of presenting charges to boards composed of colleagues of the accused or in open hearings. One administrator, quoted earlier in this report, noted "few students are willing to do that"11/

- The grievance procedure should directly involve institutional personnel of authority, prestige, and credibility. Many respondents to the Council's Call for Information indicated that they had not used available grievance procedures because of their ineffectiveness -- a problem of perception as well as fact, and one which can only be put to rest by the visible involvement of senior, well-respected personnel.

- The grievance procedure should be centralized and visible. One respondent described nearly a dozen formal "splinter" procedures, an approach which works against liability management. Others described their systems as too informal or underpublicized to be meaningfully available -- one cannot use what one does not know exists.

9/ See Part I, Page 41.

10/ See, for example, Williams v. Civiletti, 22 FEP Cases 1311 (D.D.C. N. 74-186, May 6, 1980) on remand from D.C. Cir. (17 FEP Cases 1162, 587 F. 2d 1240).

11/ See Part I, Page 31.

Ultimately, of course, any system will be judged by its products. The postsecondary community is too diverse to permit any single system of handling grievances (let alone full-scale liability management on sexual harassment) to be universally appropriate. The key to ending sexual harassment on the campus requires not only a decision and active commitment by top institutional officials, but the establishment of an equitable process leading to equitable resolution of complaints.

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national advisory council on women's educational programs

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October 1979

Contact: Frank Till
(202) 653-5846

Call for Information

on the Sexual Harassment of Students

The National Advisory Council on Women's Educational Programs is conducting an on-going project to examine ways in which the Federal government can and should assist in protecting students from being sexually harassed by faculty, staff or other employees of secondary and postsecondary education institutions. As part of that study, the Council is requesting information from former and present victims about their experiences, and from any others who may have knowledge of such harassment.

Responses need not provide any data which might identify the respondent, but should describe the type of harassment involved, the institutional and academic setting in which the incident(s) took place, any institutional or other action on the matter if the incident was reported, and the eventual outcome. Although the Council welcomes comments on this issue at any time, we hope to conclude this phase of the project by January 1980, and ask that responses be submitted before then. Depending on the nature, scope, and circumstances of sexual harassment reported, the Council may hold hearings on this subject in the future. Ultimately, the Council may make recommendations for appropriate Federal action on the problem if warranted by the project's findings.

The National Advisory Council on Women's Educational Programs is a presidentially appointed body, established by Congress to advise and report on attaining sex equity in education. Its offices are at 1832 M Street, N.W., Suite 821, Washington, D.C., 20036. Responses should be addressed to the chair of the Council, Ms. Eliza M. Carney.

* * * * * * * * *

YOUR ASSISTANCE IN EXTENDING THE REACH OF THIS CALL IS VITAL TO THE SUCCESS OF THE STUDY. REPRODUCTION OF THE CALL IN YOUR NEWSLETTERS OR OTHER PRINT MEDIA IS ESPECIALLY IMPORTANT AND WILL BE GREATLY APPRECIATED.

APPENDIX A

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APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1604

Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Interim Interpretive Guidelines

AGENCY: Equal Employment Opportunity Commission.

ACTION: Interim amendment to guidelines on discrimination because of sex.

SUMMARY: The Equal Employment Opportunity Commission is amending its Guidelines on Discrimination Because of Sex on an interim basis, in order to clarify its position on the issue of sexual harassment and to invite the public to comment on the issue. This amendment will re-affirm that sexual harassment is an unlawful employment practice. These Interim Guidelines are in full effect from the date of their publication; however, EEOC will receive comments for 60 days subsequent to the date of publication. After the comment period EEOC will evaluate the comments, make whatever changes to the Interim Guidelines may seem appropriate in light of the comments, and publish the final Guidelines.

DATES: Effective date: April 11, 1980. Comments must be received on or before June 10, 1980.

ADDRESSES: Written comments may be addressed to: Executive Secretariat, Equal Employment Opportunity Commission, 2401 E Street, NW., Room 4096, Washington, D.C. 20506.

All envelopes should be marked Sexual Harassment on the lower left corner.

All public comments may be reviewed from 9:30 a.m. to 4:30 p.m., Monday through Friday, at: Library (Room 2303), EEOC, 2401 E Street, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Frederick D. Dorsey, Director, Office of Policy Implementation, Room 4002, 2401 E Street, NW., Washington, DC 20506, (202) 634–7060.

SUPPLEMENTARY INFORMATION: Sexual harassment like harassment on the basis of color, race, religion, or national origin, has long been recognized by EEOC as a violation of Section 703 of Title VII of the Civil Rights Act of 1964, as amended. However, despite the position taken by the Commission, sexual harassment continues to be especially widespread. Because of the continued prevalence of this unlawful practice, the Commission has determined that there is a need for guidelines in this area of Title VII law. Therefore, on an interim basis EEOC is amending its Guidelines on Discrimination because of Sex (37 FR 6836, April 5, 1972, as amended) to add § 1604.11, Sexual Harassment.

Interim § 1604.11(a) provides that harassment on the basis of sex is a violation of Title VII and states that such unwelcomed behavior may be either physical or verbal in nature. The interim section also sets out three criteria for determining whether an action constitutes unlawful behavior. These criteria are (1) submission to the conduct is either an explicit or implicit term or condition of employment; (2) submission to or rejection of the conduct is used as the basis for employment decisions affecting the person who did the submitting or rejecting; or (3) the conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment. It is the Commission's position that sexual harassment, like racial harassment, generates a harmful atmosphere. Under Title VII, employees should be afforded a working environment free of discriminatory intimidation whether based on sex, race, religion, or national origin. Therefore, the employer has an affirmative duty to maintain a workplace free of sexual harassment and intimidation.

Interim § 1604.11(b) recognizes that the question of whether a particular action or incident establishes a purely personal, social relationship without a discriminatory employment effect requires a factual determination. In making such a determination, the Commission will look at the record as a whole and at the totality of the circumstances, emphasizing the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

Interim § 1604.11(c) applies general Title VII principles to the issue of sexual harassment and states that an employer is responsible for the acts of its supervisory employees or agents, regardless of whether the acts were authorized or forbidden by the employer and regardless of whether the employer knew or should have known of the acts. This paragraph (c) of § 1604.11 further states that the Commission will determine whether an individual acts in either an agency or a supervisory capacity on a case by case basis, examining the circumstances of the

particular employment relationship and the job functions performed by the individual, rather than accepting an individual's title as being controlling.

Interim § 1604.11(d) distinguishes the employer's responsibility for the acts of its agents or supervisors from the responsibility it has for the acts of other persons. This paragraph (d) of 1604.11 states that liability for the acts of those persons not mentioned in paragraph (c) exists only when the employer, or its agents or supervisory employees, knows or should have known of the conduct. The paragraph further provides that the employer may rebut this apparent liability for the conduct by showing that it took immediate and appropriate corrective action.

Consistent with the policy of voluntary compliance under Title VII, § 1604.11(e) recognizes that the best way to achieve an environment free of sexual harassment is to prevent the occurrence of sexual harassment by utilizing appropriate methods to alert the employees to the problem and to stress that sexual harassment, in any form, will not be tolerated. This paragraph (e) of § 1604.11 requires an employer to take all steps necessary for the prevention of sexual harassment and gives the following as examples of steps which might be deemed necessary: Affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise the issue of sexual harassment under Title VII, and developing methods to sensitize all concerned.

This amendment to the "Guidelines on Discrimination Because of Sex" is a significant regulation under Executive Order 12044, "Improving Government Regulations" (43 FR 12661, March 24, 1978). There are no regulatory burdens or recordkeeping requirements necessary for compliance with the amendment. The Commission has determined that these proposed guidelines will not have major impact on the economy and that a regulatory analysis is not necessary.

In compliance with Executive Order 12067 (43 FR 28967, July 5, 1978), the Commission has consulted with representatives of the Office of Personnel Management, Department of Justice, Department of Labor, and Department of Health, Education, and Welfare. At the end of the 60 day comment period, the Commission will again consult with these agencies on the issues raised through the public comment process.

Signed at Washington, D.C. this 3rd day of April, 1980.

Eleanor H. Norton,

Chair, Equal Employment Opportunity Commission.

Accordingly, 29 CFR Chapter XIV, Part 1604 is amended by adding § 1604.11 to read as follows:

PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to persons other than those mentioned in paragraph (c) of this section, an employer is responsible for acts of sexual harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

(e) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

[FR Doc. 80-10848 Filed 4-8-80; 12:28 pm]
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[1] The principles involved here continue to apply to race, color, religion or national origin.

APPENDIX C

A STUDENT'S GUIDE TO LEGAL REMEDIES FOR SEXUAL HARASSMENT

REMEDY	DESCRIPTION	TYPES OF BENEFIT/SANCTION	DURATION	DRAWBACKS
Title IX, 1972 Education Amendments	Federal law prohibiting sex discrimination in education; complaints may be filed with any Federal agency which grants assistance to the school, or private suit may be initiated.	Agencies can require school to correct problem or face cut-off of Federal funds; suit may result in injunctive relief; some possibility of damages through litigation; successful plaintiffs eligible for attorneys' fees awards under Attorneys Fees Act.	With some exceptions, agencies are required to resolve complaints within 195 days of receipt of complaint; if school does not come into compliance, enforcement can take several years; litigation may provide quick short-term relief, but suits will take a year or more to complete.	Only the Education Department, Department of Energy and Department of Agriculture have final regulations; other agencies may not accept complaints; only the Education Department has full-scale enforcement program; no hard policy from any agency on coverage of harassment issues, so complaints may languish while agencies work out policy problems; no real judicial history to provide precedent; risky.
Civil Lawsuits	Tort lawsuits; breach of contract.	Financial compensation for any losses or physical/emotional/mental injury; injunctions.	Varies; 2-3 years likely where damages are sought.	Expensive (fees come out of, and may exceed the amount of any damages); slow.
Rape and other criminal statutes	Varies by State; usually includes sexual assault, assault, and battery claims; prosecution at discretion of police authorities, public prosecutor.	Fines, imprisonment.	1 year.	Compensation for victim possible but unlikely; prosecution unlikely in "minor" crimes without witnesses and/or strong corroboration; great emotional strain; convicted offenders from upper socio-economic classes likely to receive only suspended sentences or court ordered therapy even where rape is involinvolved.
State Civil Rights Laws	Prohibit sex-based discrimination; usually enforced by Human Rights Commissions; great variance from State to State.	Varies; in some States can include cease and desist orders, jury trial award of damages.	Great variation; 6 months to 3 years.	Differ from State to State; may be difficult to secure agreement that sexual harassment of students is covered.